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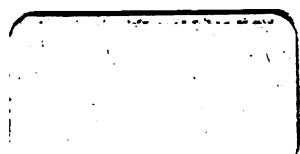
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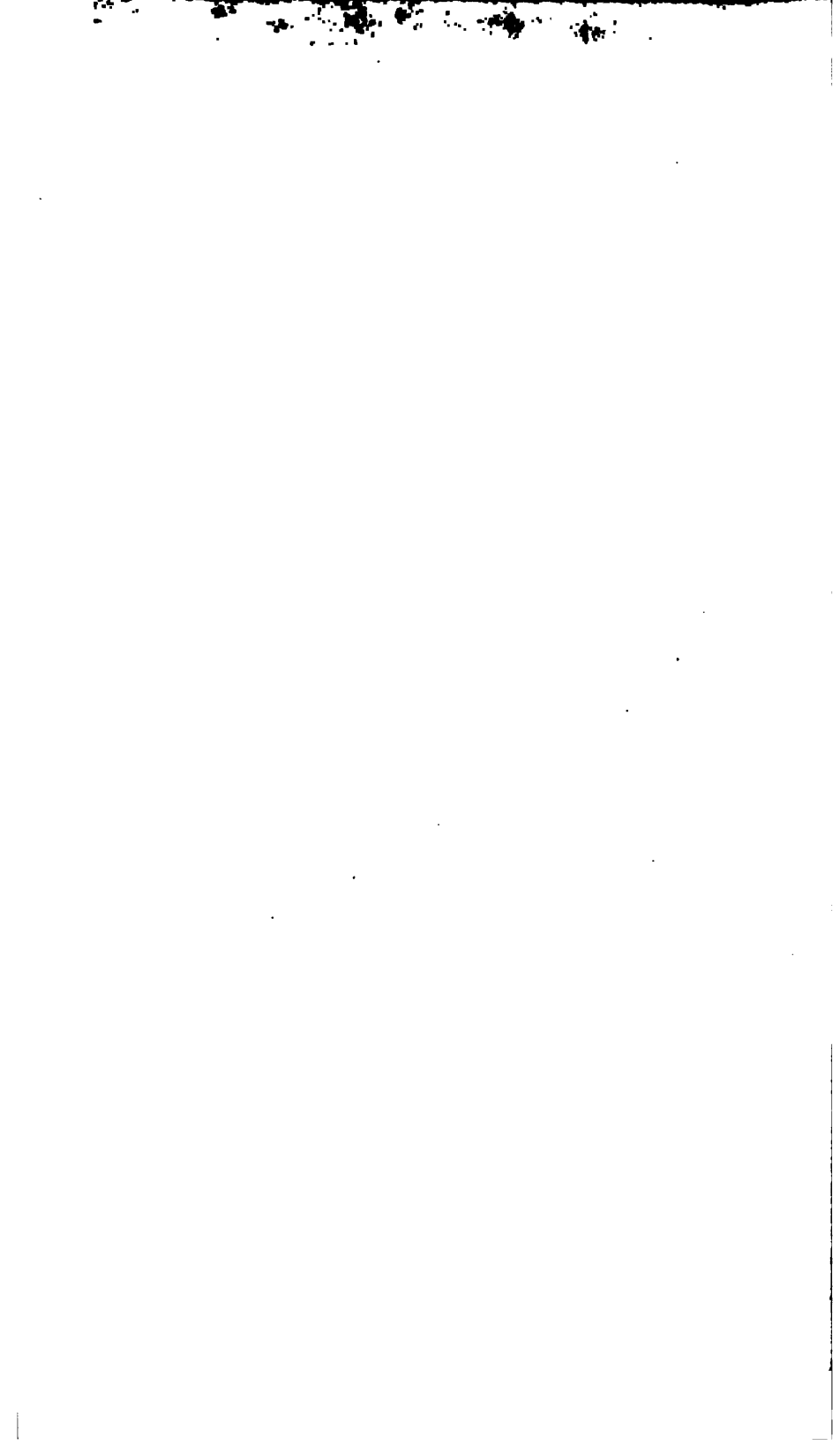
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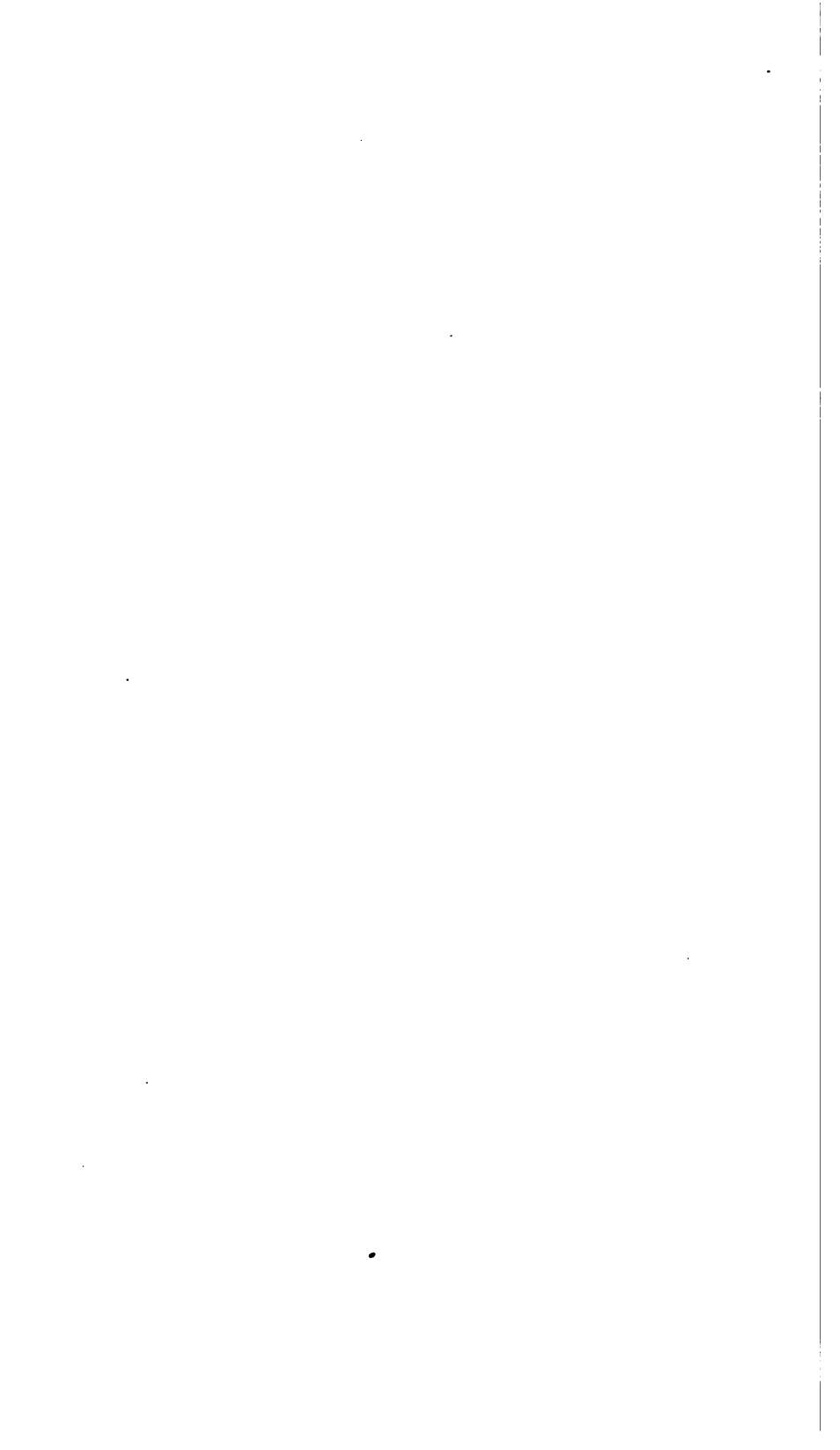
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

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J. R. SHARPSTEIN.

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WILLIAM H. COOMBS.

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WILLIAM M. FRANKLIN,
JAMES I. BEST,
JAMES B. BLACK.

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JOSEPH M. BECK,
AUSTIN ADAMS,
WILLIAM H. SEEVERS.

KANSAS.

ALBERT H. HORTON, CHIEF JUSTICE.
DANIEL M. VALENTINE,
DAVID J. BREWER.

KENTUCKY.

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THOMAS F. HARGIS, CHIEF JUSTICE.†
THOMAS H. HINES,
WILLIAM S. PRYOR,
JOS. H. LEWIS,‡

LOUISIANA.

EDWARD BERMUDEZ, CHIEF JUSTICE.
FÉLIX P. POCHÉ,
ROBERT B. TODD,
WILLIAM M. LEVY,§
CHARLES E. FENNER,
THOMAS C. MANNING.¶

* January term, 1883.

† September term, 1883.

‡ September term, 1883.

§ Deceased.

¶ Appointed in place of Wm. M. Levy, deceased.

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 JOHN M. BERRY,
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COMMISSION OF APPEALS.

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CASES

IN THE

SUPREME COURT

OF

INDIANA.

FAULKNER V. CITY OF AURORA.

(85 Ind. 130.)

Municipal corporation — nuisance — coasting on street.

A traveller on a city street was injured by persons coasting on the street. The coasting was carried on by a large crowd, in presence of the mayor, marshal and police officers. There was an ordinance prohibiting on the streets all sports tending to produce bodily injury. *Held*, that no action would lie against the city.

ACTION for personal injuries. The opinion states the case. The defendant had judgment below.

O. F. Roberts, for appellant.

C. S. Jelley, for appellee.

MORRIS, C. The appellant sued the appellee for an injury sustained by his son, on Main street in the city of Aurora, on the 30th day of November, 1880.

It is alleged in the complaint, that from the 1st day of November, 1880, until the 15th day of February, 1881, said Main street, ex-

tending from Fifth street to First street in said city, and crossed by Fourth, Third and Second streets in said city, was during said time, between Fifth and Third streets, covered with frozen snow and ice to the depth of five inches, rendering its surface smooth, even and sleek; that during said period large crowds, numbering one hundred persons, daily and nightly assembled on said Main street, between Fifth and Third streets in said city, with the knowledge of the appellee, and in the presence of its mayor, marshal and police officers, and engaged in the sport of sliding and coasting down Main street, over Fourth street, where the descent of Main street was very great, at the rate of forty miles per hour, thereby rendering said Main street and Fourth street, where it crossed the same, dangerous and unsafe for travel; that the plaintiff's son, Benjamin Faulkner, a lad about seven years of age, was accustomed to pass along said Fourth street, over Main street, to and from the public school in said city, that being the most direct and convenient way to and from said school; that on the 30th day of November, 1880, the appellant's said son was passing over said Main street on Fourth street, when he was struck, without fault on his part, by a sled propelled by the weight of two persons, so unlawfully engaged in the sport of sliding and coasting on said street, whereby his leg was broken, and he was otherwise greatly bruised and injured. It is averred that the appellant's son was confined to his bed for a long time, that the appellant was put to great trouble and expense in nursing and caring for his said son. It is also averred that the following provisions of the ordinances of the appellee were in force at the time:

“ Art. 4, § 2. Each officer of the city of Aurora shall faithfully do and perform the duties required of him in his office by the act of incorporation and by the ordinances and by-laws of the city and resolutions of the city council.

“ Art. 11, § 32. It shall be unlawful for any minor or other person or persons to throw stones, play ball, pitch quoits, or engage in any sport or do any thing on any street or alley, within the city limits, tending to produce a bodily injury, or endanger the life or property of any person.

“ Art. 11, § —. Any person violating any provision of this article shall, upon conviction before the mayor or other competent jurisdiction, forfeit and pay to said city such penalty as may be assessed, not less than one nor more than one hundred dollars, with costs.”

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The appellee demurred to the complaint on the ground that it did not contain facts sufficient to constitute a cause of action. The demurrer was sustained. The appellant excepted, and electing to stand by his complaint, final judgment was rendered against him and in favor of the appellee, for costs.

The rendering of judgment against the appellant, and the sustaining of the demurrer to his complaint, are assigned as errors.

It is alleged in the complaint that the appellee had notice of the occupation of its street by said coasters, and that the sport of coasting was carried on in the presence of its officers. It is also alleged that the appellee had by ordinance prohibited, under suitable penalties, all persons from engaging in any sport on its streets that might be dangerous to life or property; that said coasting was dangerous to life, and that no efforts were made by the appellee or its officers to suppress or prevent this dangerous sport.

That the occupation of one of the travelled streets of the appellee by coasters in the manner stated in the complaint would seriously interfere with the legitimate public use of the same, and endanger the safety of those rightfully travelling along and across it, hardly admits of a doubt. Such a use of the streets of a city is not only unauthorized and wrong, but altogether inconsistent with the rights of the public.

"Highways," says a recent writer of approved authority, "are intended for and devoted to the purposes of public travel, and every person may exercise this right reasonably. But every unreasonable use of the same, whereby others are hindered, delayed or annoyed in a like reasonable use of the same, or in the rights incident thereto is a nuisance. But whether a particular use, that is not a nuisance *per se*, is an unreasonable use and nuisance, is a question of fact, to be judged of from the circumstances of each case." Wood Law of Nuisances, § 251.

Though the coasting on Main street, within the corporate limits of the appellee as described in the complaint, constituted a nuisance, yet it could hardly be said that if one person should descend said street on a sled at a proper time and at a moderate rate of speed, though in sport and for pleasure merely, such use of the street would necessarily constitute a nuisance. Such a use of the street might not be inconsistent with its use by the public nor render it dangerous or unsafe for travel. A person may drive his horse along the street at a reasonable rate of speed, even for pleasure, consist-

ently with the use of the same by the public; but if he should drive his horse at a rapid and unreasonable rate of speed, it would endanger the safety of travel, and become a nuisance. Whether the coasting or the driving of the horse upon the street for pleasure would be a nuisance would depend upon the circumstances of each case. A police officer who would attempt to stop the one or the other would act at his peril; he would have to determine the fact, and if he misjudged he would be responsible.

It would be difficult, if not impossible, to suggest any ground upon which, consistently with the adjudged cases and the principles of law, the liability of the appellee for the injury complained of can rest. Those who injured the appellant were in no way connected with the appellee; they acted upon their own volition, and carried on their sport for their own pleasure, not for the benefit of the appellee, nor at its instance. The wrong was theirs, not the appellee's. The sport in which they were engaged was not necessarily a nuisance; it might have been carried on innocently. *Hutchinson v. Concord*, 41 Vt. 271. Was it the duty of the appellee to watch the sport and determine, judicially and at its peril, when it ceased to be innocent and lawful and became dangerous and unlawful? And if it failed to discover the line separating between innocence and wrong, is it to be held liable for such error of judgment? The determination of such a question is not only judicial in its character, but it must necessarily depend upon the actual facts in the particular case. Wood Law of Nuisances, *supra*. To hold the appellee liable for errors of judgment upon such a question would be opposed to the decided weight of authority. *Dill Mun. Corp.*, § 32; *Gale v. Kalamazoo*, 23 Mich. 344; s. c., 9 Am. Rep. 80; *Brimmer v. Boston*, 102 Mass. 19.

In the case of *Wilson v. Mayor*, 1 Denio, 595, it is held that where a duty, judicial in its nature, is imposed upon a corporation, it is not liable even for misconduct in its exercise.

In this case the appellee had by ordinance prohibited all persons from engaging in dangerous sports upon its streets. It is alleged in the complaint, at least inferentially, that the coasting complained of was carried on in violation of this ordinance. But it is also averred, that neither the appellee nor its officers attempted in any way to suppress or prevent the unlawful occupation of its streets by the coasters.

The appellee having by the express terms of the statute exclu-

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sive power over its streets, had authority doubtless, by ordinance, to empower its officers to stop and suppress coasting upon its streets at once. But was it bound to do so? If it deemed the ordinance referred to in the complaint sufficient to prevent coasting and other dangerous sports upon its streets, is it to be adjudged liable because it did not provide a more stringent and perhaps a better and more efficient remedy? The law has confided to the legislative judgment and discretion of the common council of the appellee the power to enact ordinances. If in the honest exercise of this power, the common council fails, through want of experience or defect of judgment, to establish such laws as are most completely and effectively adapted to the accomplishment of the end in view, the city is not liable. Dill. Mun. Corp., § 753, and cases there cited; *Brinkmeyer v. City of Evansville*, 29 Ind. 187. It could only prevent or suppress such sports through its officers, and for their neglect, as we shall hereafter see, it is not liable.

We are aware that the case of *Marriott v. Mayor, etc.*, 9 Md. 160, is opposed to this conclusion, but we regard the case as exceptional and without support. Besides by the express provisions of the charter of Baltimore, the city council had, at the time referred to in the opinion, power to declare what should constitute a nuisance, and to abate the same. The court held that it was the duty of the city council to declare by ordinance coasting on its streets to be a nuisance, and to prevent it; and that for its failure to do so, it might at common law be liable to a party injured, without his fault, by coasters.

Without seriously complaining of the appellee for having failed to pass a proper ordinance for the prevention of coasting, the appellant seems to rest his right to recover upon its failure to execute the ordinance which it had adopted. Was the appellee liable for such failure? Any one of the appellee's citizens might, under the ordinance, have instituted proceedings against persons coasting on the streets in violation of its provisions. Grant however that it was peculiarly the duty of the officers of the appellee to enforce the ordinance and prosecute all persons violating the same, the appellee would not be liable for their failure to discharge this duty. Dillon says, section 754:

"Unless there be a valid contract creating, or a statute declaring the liability, a municipal corporation is not bound to provide for and secure a perfect execution of its by-laws, and it is not responsi-

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ble in a civil action for the neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened." A city is not liable for the neglect of its marshal, its police officers or firemen appointed by it. *Buttrick v. City of Lowell*, 1 Allen, 172; *Ready v. Mayor*, 6 Ala. 327; *Schultz v. City of Milwaukee*, 49 Wis. 254; s. c., 35 Am. Rep. 779; *Levy v. Mayor*, 1 Sandf. 465, approved in *Lorillard v. Town of Monroe*, 11 N. Y. 392; *Griffin v. Mayor*, 9 id. 456. But aside from this view of the case, we think the appellee was not legally bound to prevent or abate the nuisance complained of by the appellant. In the case of *Schultz v. City of Milwaukee*, *supra*, which is precisely the case before us, the court says:

"The coasting or sliding down Poplar street in the manner and to the extent charged in the complaint was, while being indulged in, a grievous public nuisance, which the city authorities ought to have prevented or suppressed. But this duty is a public or police rather than a corporate duty, in the performance of which the corporation, as such, 'has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community.' " And the court explains its former decisions in the case of *Little v. City of Madison*, 42 Wis. 643; s. c., 24 Am. Rep. 435, relied upon by the appellant, as follows: "Yet the precise ground of the judgment in that case is, that if a municipal corporation, in the attempted exercise of any power conferred upon it by law, as to license shows, amusements and the like, exceeds its authority, and licenses the placing of a public nuisance in a street, or the unlawful and dangerous use of a street for any purpose, and an injury results therefrom, without negligence on the part of the person injured, the municipality is liable to respond in damages for such injury. The case goes no further, and could not without violating well settled principles of law."

Public streets are for the public use and the use is none the less for the public at large because they are situated within a municipality and subject to its supervision, and for this reason, placing obstructions thereon is an indictable offense and may be restrained in equity. Dill. Mun. Corp., §§ 519 and 520; *Smith v. State*, 3 Zab. 712; *State v. Cincinnati, etc., Co.*, 18 Ohio St. 262.

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In the case of *Borough of Norristown v. Fitzpatrick*, 94 Penn. St. 121; s. c., 39 Am. Rep. 771, it was held that a person injured by the discharge of a cannon by a crowd collected together on one of the streets of the borough, which had been engaged in firing the cannon for amusement for some hours, was not entitled to recover from the village damages for such injury. GORDON, J., says: "Admitting that a mob is a nuisance, and that of the worst kind, nevertheless it is one that a municipal corporation could not abate by the use of ordinary appliances such as suffice for the removal of natural or material obstructions in or near a highway; resort must therefore be had to the police force, but as we have already seen, for the doings or misdoings of those who compose this force the municipality is not liable."

If as held in this case, a municipal corporation is not liable to a person injured by the discharge of a cannon by men collected in its streets for the purpose of firing the cannon for their amusement, it could hardly be held liable for an injury occasioned by the less dangerous amusement of persons coasting upon its streets. In the case cited, it was justly held that the persons engaged in the firing of the cannon were liable to the party injured, and so doubtless would the parties in this case, who were engaged in the unlawful sport which resulted in injury to the appellant, be liable to him in damages.

In the case of *Ray v. Manchester*, 46 N. H. 59, and in the case of *Hutchinson v. Concord*, 41 Vt. 271, it was held that coasting on a highway is not a defect in a highway for which a city or town is liable. The same has been held in Massachusetts. *Cole v. Newburyport*, 129 Mass. 594; s. c., 37 Am. Rep. 394; *Shepherd v. Inhabitants of Chelsea*, 4 Allen, 113.

In the case of *Hutchinson v. Concord*, *supra*, the court says: "It is true that towns may be liable for damages by obstructions placed in the highway by others without any agency of the town or its officers, such as a log, wood, timber, or stone, if the town negligently suffers such obstructions to remain, exposing the traveller to danger. But in such case the road, with such objects resting upon it, is thereby rendered insufficient or out of repair; and the town has the power to restore it to its proper condition. * * * But as to the boys with their sleds upon the road, it is quite different. It is not made unlawful by the statute, to travel upon the highway with such sleds, nor are the selectmen empowered to prohibit it. The

selectmen are only empowered to prohibit one mode of use of such sleds, or like vehicles, upon the highway; that is, coasting; and then only when and where, in their opinion, the travelling public is, or is likely to be, endangered by it."

It is insisted by the appellant, that the rule in Massachusetts and other New England States upon this subject is more limited than it is elsewhere. The statutes of Massachusetts and the other New England States provide that highways shall be kept in repair at the expense of the town or city in which they are situated, so as to be safe and convenient for travellers; and that any person who receives or suffers bodily injury through a defect or want of repair in the highway may recover the amount of damages thereby sustained, in an action against the city or town obliged to repair the same.

It is held under this statute that any thing in the condition of a highway, which renders it unsafe or inconvenient for travel, is a defect or want of repair. It may be a hole in the highway, or it may consist of a stone or log or other obstacle left on its surface, or a post standing within its limits, or a barrier stretched across it, though not touching it; or it may be trees or walls standing by or upon it, and liable to fall and injure travellers; or it may be an awning projecting over it. For a failure to remove any obstruction from the highway, or to repair it and to keep it in a condition to be reasonably safe for travel, the statute expressly makes the city or town in which the highway is located liable for injuries resulting from obstructions or want of repair of such highway.

The law of Indiana and many other States gives to incorporated cities jurisdiction over the streets located within their limits, and the means necessary to keep them in repair and reasonably safe for travel. Hence the duty to keep the streets reasonably fit and safe for public use is implied, and also the liability for a failure to discharge this duty. It would seem therefore that the law of Indiana upon the subject is the same as that of Massachusetts. If in this State, a city keeps the streets within its limits in a reasonably safe and convenient condition for public use, it has discharged its whole duty upon the subject; if a city in Massachusetts does less than this, it fails to discharge the duty imposed upon it by the statute of the State. If coasting upon a public street in a city in Indiana is to be regarded as an obstruction which the city is bound to prevent or suppress, it should be so regarded in Massachusetts.

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In speaking upon the general implied liability of cities, Judge Dillon says, § 789: "A municipal corporation is not an insurer against accidents upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day." This is the liability, which under its statutes, is held to exist in Massachusetts.

In the case of *Barber v. City of Roxbury*, 11 Allen, 318, the court says: "But we are not aware of any precedent for holding an illegal use of the highway by men, animals, vehicles, engines or any other object, while movable and actually being moved by human will and direction, and neither fixed to, nor resting on, nor remaining in one position within the travelled part of the highway, to be a defect or want of repair for which the city or town is liable."

It is obvious that in the case before us the injury did not result from any defect in the highway. It was produced by the act of those improperly and unlawfully using the highway, which was at the time, and but for the unlawful acts of those improperly using the street, in a reasonably safe and convenient condition for public travel. The complaint is not that the appellant's son was injured because of defects in the street rendering it unsafe and unfit for public use, but because persons, while engaged in improperly using the street, ran their coasting sled against his son, thereby injuring him. If the appellee is liable for the injury thus produced, it would follow, logically, that it would be liable for an injury caused by loafers lounging upon its streets, occurring in the presence of its officers, if it were known that such persons were accustomed to lounge and loaf upon its streets. To hold incorporated cities liable for such injuries would be unjust, and we think without the sanction of law.

As was held in the case of *Borough of Norristown v. Fitzpatrick*, *supra*, the appellee could only arrest and stop the sport of coasting upon its streets through its officers and police force, but as held in the same case, the appellee would not be responsible for the neglect or failure of its officers to stop those engaged in thus using its streets.

In the case of *Norristown v. Moyer*, 67 Penn. St. 355, relied upon

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by the appellant, it was incidentally and by way of illustration stated by the judge who tried the case, that persons lounging and loafing upon the street corners constituted a nuisance, but it was not held nor was it intimated that the city would be liable for the misdeeds of such loafers.

In the case of *Parker v. Mayor*, 39 Ga. 725, and the cases in this State referred to by the appellant, the objects rendering the use of the highway unsafe and dangerous were of a material nature, fixed, and not at the time being moved and controlled by human will and direction. They were such objects as would constitute a nuisance in Pennsylvania, Wisconsin, and Massachusetts, as well as in Georgia or Indiana.

We think there was no error in sustaining the demurrer to the complaint.

Per Curiam.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

So ordered.

COOMBS, J., dissents; NIBLACK, J., doubts.

KEISER V. LOVETT.

(88 Ind. 340.)

Nuisance — stable — injunction.

A stable is not a nuisance *per se*, and an injunction will not issue to restrain the erection of a building designed for a stable, twenty-five or thirty feet from the plaintiff's house and well, in the absence of proof that the building was to be used as a stable and that such use would be dangerous or offensive to the occupants of the plaintiff's house.

ACTION for injunction. The opinion states the case. The plaintiff had judgment below.

J. W. Sansberry, M. A. Chipman and J. W. Sansberry, Jr., for appellants.

M. S. Robinson and J. W. Lovett, for appellee.

BEST, C. This action was brought to enjoin the appellants from erecting a stable near the residence of the appellee.

The parties own adjoining lots in the city of Anderson, fifty feet in width, between which there is a graded and gravelled way eight feet wide, in which each has an easement, and which is used by them in common as the only way from the street on the front to the rear of their respective lots. The complaint avers that the appellants are obstructing this way by erecting a stable thereon so near the appellee's residence that if used for such purpose, as threatened, it will diminish the value of his property, endanger the health of himself and family, and will render his property useless as a residence.

A demurrer to the complaint was overruled; an answer filed; a trial had; a finding made for the appellee; and over motions for a new trial and in arrest, final judgment was rendered upon the finding, perpetually enjoining the appellants from erecting and using such building for a stable, but not from erecting it and using it for any other purpose.

The demurrer to the complaint and the motion in arrest of judgment present the same question, and that is, whether the complaint states facts sufficient to constitute a cause of action.

Without setting out the complaint more fully, we will say that the averments as to the threatened use of the stable, coupled with the averments as to the obstruction of the graded and gravelled way, were sufficient, in our opinion, to constitute a cause of action, and that the demurrer and the motion in arrest of judgment were properly overruled.

The motion for a new trial embraced many reasons, and among others, it was insisted that the finding was not sustained by sufficient evidence, and was contrary to law. These reasons were, in our opinion, well assigned, and the others will not be noticed.

The material facts are undisputed. The appellee owned and resided with his family upon a lot fifty feet wide by two hundred and sixteen deep, fronting north on a public street, in the city of Anderson. The appellants owned and resided upon the adjoining lot upon the west. This lot was fifty feet wide and one hundred and eight feet long. Between these lots, and occupying a strip four feet wide off each of them, there was a graded and gravelled way eight feet wide, extending from the street in front to the street in rear of the appellee's lot. This way was closed by a gate at each

street, and by one at the rear of appellants' lot. The appellants had procured the material, employed a carpenter, and had raised the frame of a building at the south-east corner of their lot, on a line with the west side of the graded way, fifteen feet in width, east and west, by thirty feet in length, north and south. This frame was sixteen feet high, was to be covered with a shingle roof of the ordinary pitch, inclosed and divided as follows: A room fourteen feet in width off the north end was to be used for a wood-house and store room; the next eight feet was to be finished for a buggy shed, and the residue for a horse stall. The place where the stall was to be constructed was according to the appellee's testimony, twenty-five or twenty-six feet from his well, and twenty-eight or twenty-nine feet from the corner of his house. According to the testimony of others, it was nearly twice this distance. The appellants did not own a horse, nor did they have one. No threats were made about the manner of keeping one. Nothing at all was said about keeping a horse except by the appellant Samuel. When he directed the carpenter to fix the stall, he said to him, that if he ever got a horse he would use the stall, and he said to a neighbor, who inquired of him what he intended to build, that "he was going to put up a wood-shed, a buggy-shed, and a place to keep a horse when he wanted to keep one." There was some testimony tending to show in what manner the appellee's property would be affected if a stable should be kept, as stables are usually kept, where this frame was erected; but as there was no evidence whatever that the appellants threatened to keep such stable, or contemplated any such thing, these opinions were mere conjectures, based upon an assumed state of facts that had no foundation whatever in the evidence, and therefore cannot possibly support the finding. The facts are, that appellants intended to construct a stall for a horse in a building they proposed to erect within the distance averred from the appellee's residence. The mere construction of the stall is not a nuisance, and appellants cannot be enjoined from building it. Its character depends upon the manner in which it shall be used. The manner of its use is now wholly problematical. Indeed its use at all depends upon a contingency that may never arise; and if it ever arises, the stall may be so finished and so used that its use may in no manner affect injuriously the appellee, his family or his property. A stable is not a nuisance *per se*. *Curtis v. Winslow*, 38 Vt. 690; *Burditt v. Swenson*, 17 Tex. 489; *Shiras v. Olinger*, 50 Iowa, 571; s. c., 32 Am. Rep. 138.

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Whether it is or not, depends upon the mode of its construction, its proximity to residences, and the manner in which it is used. *Aldrich v. Howard*, 7 R. I. 87; *Kirkman v. Handy*, 11 Humph. 406; *Flint v. Russell*, 5 Dill. 151.

An injunction will not be granted where the apprehended injury is merely contingent. *Cleveland v. Citizens, etc., Co.*, 20 N. J. Eq. 201; *Rhodes v. Dunbar*, 57 Penn. St. 274; *Wood Nuis.*, § 789.

This is especially true where the anticipated injury arises from the use to which the property is to be put, and not from the nature of the structure itself. *Duncan v. Hayes*, 22 N. J. Eq. 25; *Flint v. Russell*, 5 Dill. 151.

Courts of equity will not, in advance, enjoin the erection and use of a building when the use of it may not prove essentially injurious to others. *Loring v. Small*, 50 Iowa, 271; s. c., 32 Am. Rep. 136; *Curtis v. Winslow*, 38 Vt. 690.

In this case there was no evidence that the building obstructed the graded and gravelled way. There was some dispute whether the frame, when first erected and when the suit was commenced, did not extend a few inches over the west line of the graded and gravelled way; but the frame was at once moved and placed entirely upon the appellants' premises, so that at the trial there was no claim that it in any manner obstructed the way. The right to recover depended entirely upon the fact whether the stall, when constructed and used, would constitute a nuisance, and this, as we have shown, was contingent and uncertain. Under such circumstances an injunction will not be granted. The evidence was insufficient, and the motion for a new trial should have been sustained. For this error the judgment ought to be reversed.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instructions to grant a new trial.

Judgment accordingly.

CLARK V. CITY OF SOUTH BEND.

(85 Ind. 376.)

Municipal corporation — ordinance — fire.

A municipal ordinance, prohibiting the keeping on any block at one time of more than five tons of straw unless protected by a fire-proof inclosure, is valid.

THE opinion states the case.

W. G. George and L. Hubbard, for appellants.

ELLIOTT, J. The controlling question in this case is whether the common council of a city incorporated under the general law has power to adopt an ordinance containing the provision, "That no person shall keep within the territorial limits of said city, on one block at one time, a quantity of straw exceeding five tons, unless the same be inclosed within a fire proof-inclosure."

The appellants contend that the municipality had no power to adopt and enforce this ordinance, because the power to prevent the accumulation of combustible materials is not expressly conferred. This is a more narrow view of the subject than the books warrant counsel in assuming. A municipal corporation has such powers as are expressly granted, and also such implied or incidental ones as are necessary to carry into effect the express powers and effectuate the object of the corporate existence. It was long ago declared that the power to prevent danger from fire is an incidental one, belonging to all municipal corporations. A quaint statement of the rule is that found in Bacon's Abridgment; it reads thus: "So if a by-law be made in London, that none shall make a hot-press, nor use it within the city, under the penalty of £10, for the making thereof, and £5 for the use thereof, this is a good by-law; because the use of those presses is dangerous with regard to fire, and also deceitful, inasmuch as they make cloths and stuff look better to the eye than in truth they are." 2 Abridg. 147. Judge Dillon declares that the power to prevent fires is among the incidental ones of a municipal corporation, and is in its nature a police power necessary for the proper administration of the municipal government. 1 Dill. Mun. Corp. (3d ed.), §§ 141, 143.

It is said by counsel that the statute enumerates certain powers, and that this specific grant excludes all other powers except those enumerated. We do not understand the rule to be as stated by counsel. Judge Dillon says: "The true rule in such cases may perhaps be correctly expressed to be, that the enumeration of special cases does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions." 1 Dill. Mun. Corp. (3d ed.), § 316, n. This statement of the law agrees with the view of this court declared in

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City of Indianapolis v. Indianapolis, etc., Co., 66 Ind. 396. There are other provisions concerning the power of the municipal authorities to prevent and subdue fires, than those enumerated in section 53 of the general act, and taking them all into consideration, there can be no doubt that the legislature meant to confer broad powers upon the municipalities in the matter of providing against danger from fires. R. S. 1881, §§ 3198, 3199.

We have a provision in our general act which corresponds to what the courts and writers call the general welfare clause; that provision is as follows: "The common council shall have power to make other by-laws and ordinances not inconsistent with the laws of this State, and necessary to carry out the objects of the corporation." R. S. 1881, § 3155. It has been often held that under the general welfare clause, corporations may regulate the storage and transportation of gunpowder; the manner of constructing buildings; the places where wooden buildings may be built; the manner in which ashes shall be stored and disposed of; and that they may prohibit the storing of inflammable oils in insecure structures. *Williams v. City Council, etc.*, 4 Ga. 509; *Frederick v. City Council, etc.*, 5 id. 561; *City Council v. Elford*, 1 McMullen (S. C.), 234; *Brady v. Northwestern, etc., Co.*, 11 Mich. 425; *Douglass v. Commonwealth*, 2 Rawle, 262; *Wadleigh v. Gilman*, 12 Me. 403; 28 Am. Dec. 188; *Vanderbilt v. Adams*, 7 Cow. 349; *Mayor v. Hoffman*, 29 La. Ann. 651; s. c., 29 Am. Rep. 345; 1 Dill. Mun. Corp. (3d ed.), § 143.

The collection in great quantities, in this case of one hundred tons, of a material so easily ignited as straw, is an act which the municipal authorities may as a matter of general welfare legislate against; and certainly it is not going beyond their powers to require that the material shall be kept within a fire-proof inclosure. We are not deciding that such material in any quantity may not be brought within the limits of a city, but we do decide that the municipal authorities may make reasonable provision for its storage while within the corporate boundaries, and that requiring it to be kept in a proper inclosure is not an unreasonable exercise of the power to legislate for the general welfare of the municipality.

The ordinance is not an unreasonable one. The collection in one heap of five tons of inflammable material, and leaving it without protection, and exposed to the danger of ignition from the acts of careless or malicious passers-by, is an evil which the municipal

authorities are justified in taking measures to suppress and prevent and an ordinance enacted for the purpose of compelling a man who gathers such a quantity of material together to properly protect it, can not justly be characterized as unreasonable.

The ordinance is not in derogation of common right. A man has no right to collect on his own premises and leave unprotected a great quantity of combustible material. If one man may collect great quantities of inflammable material and leave it unguarded so may another, and another, and thus an entire city may be placed in peril. The truth is, there is no such thing as a common right to do, on a man's own premises or elsewhere, an act which puts in jeopardy all surrounding property.

Judgment affirmed.

WOLFORD V. POWERS.

(85 Ind. 204.)

Negotiable instrument — consideration.

A promissory note executed in consideration of a father's naming a child after the promisor, and in pursuance of the promisor's agreement that if the child were so named he would provide for its education and support, is on a valid consideration.

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

W. G. Colerick, H. Colerick, R. Stratton, R. S. Taylor and S. L. Morris, for appellant.

J. Morris, L. M. Ninde and T. E. Ellison, for appellee.

ELLIOTT, J. The appellant's complaint is founded upon a promissory note executed by the appellee's intestate. The answer of the appellee alleges that the only consideration for the note sued on was the sum of \$40 paid to the intestate by the appellant, and the agreement of the latter to bestow upon one of his children the name of Charles Lehman Wolford. The appellant replied to this answer that Charles Lehman, the intestate, had been an intimate

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friend of the appellant and a frequent visitor at his house; that Lehman was a widower, about eighty-seven years of age; that he had been the father of one boy who had died many years before the execution of the note; that his only relatives were three aged sisters; that such relations of friendship existed between appellant's family and the intestate that he spent a great part of his time at the former's house; that on the 18th day of April, 1878, a male child was born to appellant; that a few weeks after the birth of the child, Lehman requested that it should be given the name of Charles Lehman Wolford; that if that name should be given it he would make its welfare his chief object in life, "and provide for it generously, and give it a good education;" that in consideration of such promise, the appellant did name the child Charles Lehman, which name it still bears; that it was afterward agreed that as soon as suitable arrangements could be made, Lehman should become a member of appellant's family; that he had frequently visited appellant's house, and was on several occasions ill for a brief period while there, and was, at his request, cared for and supplied with simple remedies by appellant's wife; that on several occasions, appellant, at Lehman's request, hired a carriage and took him out driving; that in September, 1878, the decedent proposed to the appellant that he would, in fulfillment of his promise to provide generously for the education of his namesake and give him a start in life, and in consideration also of the services rendered to him by the appellant and his wife, execute to him his note for \$10,000, stating at the same time that he preferred to give effect to his intention toward and agreement with appellant and his child in that manner, rather than by the execution of a will or the conveyance of property; that appellant, being ignorant of the law, and supposing that a promissory note would not be valid without a money consideration, stated to the decedent that he feared that a note executed in the manner proposed would not be binding; that the decedent proposed that appellant should pay him a sum of money for the express purpose of creating a legal consideration for the note, in case the other consideration should be insufficient in law; that appellant assented, and thereupon paid the decedent \$40; "that the note was executed in consideration of the naming of the child Charles Lehman, and of the promise theretofore made by the decedent, that if the child were so named he would provide generously for its education and give it a start in the world, and of the services rendered by

the appellant and his wife, and of the sum of \$40 paid by him to the decedent." The reply also states that "the personal services rendered by the appellant were of no great pecuniary value, and were rendered without any express agreement to pay for them, but that it was, nevertheless, the intention of the decedent to compensate the appellant, and to do so upon a large and generous scale, far exceeding their intrinsic value, and so as to correspond with the estimate of their value to him; and for that purpose, and upon that consideration, with the other considerations, he executed the note sued on."

To this reply a demurrer was sustained. It is the general rule that where there is no fraud, and a party gets all the consideration he contracts for, the contract will be upheld. In *Hardesty v. Smith*, 3 Ind. 39, it was said: "When a party gets all the consideration he honestly contracted for, he cannot say that he gets no consideration, or that it has failed. If this doctrine be not correct then it is not true that parties are at liberty to make their own contracts." The same principle is declared and enforced in many of our own cases. *Kernodle v. Hunt*, 4 Blackf. 57; *Harvey v. Dakin*, 12 Ind. 481; *Baker v. Roberts*, 14 id. 552; *Taylor v. Huff*, 7 id. 680; *Louden v. Birt*, 4 id. 566; *Smock v. Pierson*, 68 id. 405; s. c., 34 Am. Rep. 269; *Neideser v. Chastain*, 71 Ind. 363; s. c., 36 Am. Rep. 198; *Williamson v. Hitner*, 79 Ind. 233. In Pollock's Principles of Contract, the author quotes approvingly from a philosophic treatise this statement: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give." An examination of the decided cases will prove this to be an unusually accurate statement of the law. In the case of *Sturlyn v. Albany*, 1 Cro. Eliz. 67, it was held that where the defendant promised the plaintiff that if he would show him a lease he would pay him a certain sum, and the contract was held valid. The report of the decision reads thus: "But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action." It is laid down in an old book that "If A., in consideration that B. will deliver to him a recognizance to read over, assumes and promises within six days to re-deliver the same to B., or to pay him £1,000, this is a good promise, upon which B. may have an action against A., for the consideration is sufficient." 1 Bacon's Abridgment, 420. In *Bainbridge v. Firm-*

stone, 8 A. & E. 743, the defendant promised the plaintiff that if he would allow him, the defendant, to weigh certain boilers, he would return them within a reasonable time, and the consideration was held sufficient, Lord DENMAN saying : "The defendant had some reason for wishing to weigh the boilers ; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive." In *Haigh v. Brooks*, 10 A. & E. 309, Lord DENMAN said, in speaking of the sufficiency of the consideration of a contract : "Both" (of the parties) "being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterward that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it ? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives ; and of their weight he was the only judge." This case came up on appeal, and Lord ABINGER, C. B., speaking for the court, said : "The actual surrender of the possession of the paper to the defendant was a sufficient consideration, without reference to its contents." *Brooks v. Haigh*, 10 A. & E. 323, 344. In the argument the case of *Wilkinson v. Oliveira*, 1 Bing. N. C. 490, was cited, wherein it was held that the surrender of a letter would support a promise to pay £1,000. Turning from the English to the American courts, we find many illustrations of the principle under discussion. In *Hempler v. Schneider*, 17 Mo. 258, the consideration for the promise was the agreement that a third person should return to St. Louis within fifty days ; and it was held sufficient, the court saying : "This court is not aware of any law which would justify it in releasing men from their lawful contracts, unless in cases of fraud, imposition, accident or mistake in their creation." The plaintiff may have sustained no damages in consequence of Nauman not having returned in fifty days, but there was a sufficient consideration for his undertaking, and he must abide the consequences of his own bargain deliberately entered into." In *Train v. Gold*, 5 Pick. 380, it is said : "So if A. promises B. to pay him a certain sum of money, if he will call for it at a particular time, and B. calls accordingly, the promise is binding, the calling for the money being a sufficient consideration. For any gain to the promisor or loss to the promisee, however trifling, is a sufficient consideration to support an express promise."

The Supreme Court of South Carolina said : " Every man was free to make a contract, and free to refuse it ; but when once made, he was bound by it, where there was no fraud, concealment or latent defect. * * *

* * * Inadequacy of consideration is not alone any ground for setting aside a contract solemnly entered into." *Whitefield v. McLeod*, 2 Bay; 1 Am. Dec. 650. In *Barnum v. Barnum*, 8 Conn. 469; 21 Am. Dec. 689, the defendant bought a lottery ticket, which at the time was utterly worthless; and he was held liable on the note executed for it. The court referred to the case of the *Earl of March v. Pigot*, 5 Burr. 2802, where two young men made a bet as to which should first come to his estate. The notes executed by the young men ran as follows : " I promise to pay to the Earl of March 500 guineas if my father dies before Sir William Codrington." The other read thus : " I promise to pay to Mr. Pigot 1,600 guineas, in case Sir William Codrington does not survive Mr. Pigot's father." At the time the bet was made Pigot's father was dead, and yet Lord MANSFIELD held that there was a valid consideration for the note.

In *Earl v. Peck*, 64 N. Y. 596, a case similar to this in many respects, the court says : " The only point insisted upon in this court relates to the consideration. The note is for \$10,000, and expresses the consideration to be for services rendered. The plaintiff had been the housekeeper for the defendant, who was a bachelor, for seven or eight years, and the latter was indebted to her for her services in some amount, and the evidence tended to prove that at some time during the service it was agreed that the amount of compensation should be left to the intestate. Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defense to a note. It is not necessary that the consideration of a note shall be equal in pecuniary value to the obligation incurred. If no part of the consideration was wanting at the time, and no part of it subsequently failed, although inadequate in amount, the note is a valid obligation. * * * There is no standard whereby courts can limit the measure of value in such a case, and an obligation is not wanting even partially in consideration, because the value is less than the obligation."

The case before us, in some of its features, resembles that of *Cowee v. Cornell*, 75 N. Y. 91 ; s. c., 31 Am. Rep. 428, where a

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note for services was sustained, although the amount was \$20,000, and greatly in excess of the value of the services. The court said: "Mere inadequacy in value of the thing bought or paid for is never intended by the legal expression, want or failure of consideration. This only covers either total worthlessness to all parties or subsequent destruction partial or complete." The case of *Lindell v. Rokes*, 60 Mo. 249; s. c., 21 Am. Rep. 395, is a peculiar one. There the consideration of the note sued on was the payee's promise to abstain from the use of intoxicating liquors for eight months; and it was held to be sufficient to support the note. In *Parks v. Francis' Adm'r*, 50 Vt. 626; s. c., 28 Am. Rep. 517, the consideration of the promise was the agreement of the father to name his son Nathan Francis Parks, and the court seems to have treated this as a valid consideration, although the point is not expressly decided, as the case went off upon a question whether the oral contract was within the statute of frauds. There are very many American cases illustrating the principle we are considering, and treating as valid all sorts of considerations, among them: *Crow v. Harmon*, 25 Mo. 417; *Johnson v. Titus*, 2 Hill, 606; *Oakley v. Boorman*, 21 Wend. 588; *Sawyer v. McLouth*, 46 Barb. 350; *Hurd v. Green*, 17 Hun, 327; *King's Ex'rs v. Hanna*, 9 B. Mour. 369; *Seymour v. Delancey*, 6 Johns. Ch. 222; 14 Am. Dec. 552; *Brooks v. Ball*, 18 Johns. 337; *Sanborn v. French*, 2 Fost. 246.

Before passing from this branch of the case, there is an English decision which we think deserves attention; the case to which we refer is that of *Shadwell v. Shadwell*, 30 L. J. 145. In that case the decedent wrote the following letter to his nephew: "I am glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay you one hundred and fifty pounds yearly during my life, and until your annual income derived from your profession of a chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require." The declaration averred that the nephew relied upon this promise, and married the woman named in the letter. ERLE, C. J., in delivering the opinion of the court, said: "Then, do these facts show that the promise was in consideration, either of the loss to be sustained by the plaintiff, or the benefit to be derived from the plaintiff to the uncle, at his, the uncle's, request? My answer is in the affirmative. First, do these facts show a loss sus-

tained by the plaintiff at the uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss; yet as between the plaintiff and the party promising an income to support the marriage, it may be a loss. * * * Secondly, do these facts show a benefit derived from the plaintiff to the uncle at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the *status* of the nephew which the uncle declares."

There are, it is commonly but not altogether accurately said, two exceptions to the general rule we have stated:

First. Where the sole consideration is money, and the amount is greatly disproportioned to the value of the promise.

Second. Where the consideration is so grossly disproportionate to the value of the promise as to indicate fraud, shock the conscience of the court, and make the enforcement of the contract unconscionable.

Of these in their order.

First. A money consideration is capable of exact and definite admeasurement; its value is fixed and unalterable, and there cannot be any uncertainty as to its adequacy or inadequacy. The parties really exercise no judgment in passing upon its value, for that never is in doubt. Courts can therefore pass upon its sufficiency without infringing the rule that where the parties have for themselves determined the sufficiency of the consideration, courts will not review their decision. *Schnell v. Nell*, 17 Ind. 29; *Shepard v. Rhodes*, 7 R. I. 470. But where the consideration is something else than money, there must be some exercise of judgment in ascertaining and settling its value.

Second. Where the consideration is so grossly inadequate as to shock the conscience, courts will interfere, although there has been some exercise of judgment by the parties in fixing it. But it will be found upon an analysis of the cases, that courts interfere upon the ground of fraud, and not upon the ground of inadequacy of consideration. The courts never do interfere, unless the consideration is so grossly inadequate as to amount to fraud or oppression. Mr. Pomeroy has given the subject careful investigation, and concludes his discussion with this remark: "Even then fraud, and not inadequacy of price, is the true and only cause for the interposition of equity and the granting of relief." 2 Pomeroy Eq. Jur., § 927.

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Judge Story is still more emphatic in his statement of the rule: "Mere inadequacy of price, or any other inequality in the bargain, is not however to be understood as constituting, *per se*, a ground to avoid a bargain in equity. For courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, and profitable or unprofitable, or otherwise, are considerations not for courts of justice but for the party himself to deliberate upon. Inadequacy of consideration is not, then, of itself, a distinct principle of relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle." 1 Story Eq. Jur., §§ 244. 245. In *Griffith v. Spratley*, 1 Cox C. C. 383, the chief baron said there was no case in which mere inadequacy of price, independent of other considerations, had been held sufficient to set aside a conveyance. In *Woodfolk v. Blount*, 3 Haywood, 146; S. C., 9 Am. Dec. 736, the Supreme Court of Tennessee made the same declaration. The case of *Harrison v. Guest*, 8 H. L. C. 481, was ably argued, and it was held, Lord Chancellor CAMPBELL, and Lords BROUGHAM, WENSLEYDALE and CRANWORTH, all giving opinions, that mere inadequacy of consideration would not invalidate a contract. Lord WENSLEYDALE said: "My lords, I entirely agree with the opinion of my noble and learned friend on the woolsack; I concur entirely in all the observations that he has made upon this case; I do not feel the least doubt about it." The case cited was very like the present, and is strong authority upon this point.

The question in the case at bar therefore comes to this: Did Wolford perpetrate a fraud upon Charles Lehman? If, upon the facts stated in the answer and reply, we can justly declare that the former was guilty of fraud, actual or constructive, then we can sustain the judgment; otherwise we must reverse it.

The character of the consideration is an important matter, as there is, as we have seen, a marked and clear distinction between a determinate money consideration and an indeterminate one. This distinction is pointed out in *Schnell v. Nell*, *supra*, and in *Smock v. Pierson*, *supra*. In this last case it was said: "In estimating the value of a thing as the consideration for a promise, there is a

manifest distinction between property of a certain and determinate value, and things which have but a contingent and indeterminate value. But in any event, mere inadequacy of consideration is not sufficient to defeat a promise." In *Kerr v. Lucas*, 1 Allen, 279, it was held that where the value of a consideration is indefinite, the parties have a right to fix it for themselves, and the courts cannot overturn their decision upon its sufficiency. The consideration in the case before us was, except as to the \$40 paid in money, an indeterminate one, and one which the parties alone were competent to measure and determine.

Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should be left undisturbed, unless, indeed, there is evidence of fraud. There is in such a case, absolutely no rule by which the courts can be guided, if once they depart from the value fixed by the promisor. If they attempt to fix some standard, it must necessarily be an arbitrary one, and ascertained only by mere conjecture. If, in the class of cases under mention there is any legal consideration for a promise, it must be sufficient for the one made; for if this be not so, then the result is that the court substitutes its own judgment for that of the promisor, and in doing this makes a new contract. Where the purpose of the party is to secure a pecuniary or property benefit, there is much more ground for judicial interference than in a case like this, where the controlling purpose is not gain, but the gratification of a desire or fancy. Even in the former class of cases, courts never do interfere upon the sole ground of inadequacy of consideration, and certainly should not in the class to which the one at bar belongs. No person in the world, other than the promisor, can estimate the value of an act which arouses his gratitude, gratifies his ambition, or pleases his fancy. If there be any consideration at all, it must be allotted the value the parties have placed upon it, or a conjectural estimate, made arbitrarily and without the semblance of a guide, must be substituted by the courts.

We turn now to the cases cited by the appellee. Three of them, *Jestons v. Brooke*, Cowp. 793, *Floyer v. Edwards*, id. 116, and *Baxter v. Wales*, 12 Mass. 365, are the same in principle, and decide that a creditor cannot fix an oppressive and unconscionable sum as the measure of damages for a breach of contract. They do

not proceed upon the ground of inadequacy of consideration, but upon the ground that a penalty for failure to perform a contract must not be oppressive. It may well be doubted whether they do not state the rule too broadly upon that point; for where the damages are indefinite and uncertain, the parties may fix a certain sum as liquidated damages, and the contract will be enforced. But we need not and do not make any decision upon this point. The case of *Ex parte Young*, 6 Biss. 53, turned upon the validity of "corner option contracts in grain," and the question as to the sufficiency of the consideration was really not discussed or decided by the court. In the case of *Cutler v. How*, 8 Mass. 257, there was no consideration at all for the part of the note held invalid, for the reason that no fees were due the officer. The cases of *Schnell v. Nell* and *Shepard v. Rhodes* decide that where the consideration is money and nothing else, courts may determine its adequacy; but they both declare that where the consideration is an indeterminate one, the rule is otherwise. In *Shepard v. Rhodes* it was said: "In all cases therefore where the assumption or undertaking is founded upon the sale or exchange of merchandise or property, or upon other than a money consideration, and the promise has been deliberately made, the law looks no further than to see that the obligation rests upon a consideration, that is, one recognized as legal and of some value." We may remark, in passing, that the doctrine, that where money is the sole consideration, the courts will interfere upon the ground of inadequacy, is denied by high authority. *Lawrence v. McCalmont*, 2 How. 426.

We do not agree with appellee's counsel that where the consideration is partly in money and partly in something else, we must, in determining whether the consideration was adequate, exclude the money part. We suppose that if a man sells a horse for a patent hay-fork and for \$40 in money, the two things must be reckoned together. But perhaps the general rule may not apply to a case like this, where it is made to appear that the payment of the money was little else than a mere matter of form, and that the real consideration for the promise was something other than the money. Without however deciding this point, we shall treat the case as resting entirely upon the two other considerations stated in the pleadings.

There are two distinct considerations stated in the reply. The first of these, the performance of services for the intestate, is in

our opinion a legal consideration. We are not unmindful of the rule that an executed consideration will not support a promise; on the contrary, we fully approve it, and carefully refrain from encroaching upon it. Nor do we hold, or mean to hold, that a voluntary service rendered as a mere favor or gratuity can constitute a valuable consideration for a promise. We hold that the pleadings in this case show that the consideration was not an executed one, and that the services were not rendered voluntarily, or as a mere matter of favor. We rest our ruling upon the fact that the services were continuous and rendered at the request of the maker of the note. In *Osborne v. Rogers*, 1 Saund. 264, an elaborate note collects the older cases upon this subject, and declares the law to be that where there is a precedent request the consideration cannot be deemed an executed one. In the appendix to Pothier on Obligations it is said, in speaking of executed considerations: "Where the act which is the consideration of the promise is founded upon a preceding request, it is sufficient." 1 Pothier Obl. 20. In Powell on Contracts, 351, the rule is thus stated: "And a consideration past will be a good ground to maintain an action upon a subsequent promise or contract, where the consideration is stated to have been at the defendant's special suit and request; for the promise, though it follows, yet is not naked, but couples itself with the suit or request before, and the merits of the party procured by that suit or request." Addison says: "Bygone acts or services will sustain an action when performed or rendered pursuant to the previous request of the promisor." 1 Addison Cont. 24, § 11; *Hicks v. Burhans*, 10 Johns. 243; *Livingston v. Rogers*, 1 Cai. 583; *Lampleigh v. Brathwait*, Hobart, 105; *Bradford v. Roulston*, 8 Irish C. L. 468; *Clarson v. Clark*, 1 Scam. 113; 25 Am. Dec. 79. It is quite certain that the request to perform the services, coupled with the promise to pay for them, takes the case out of the rule that no action will lie for services rendered voluntarily or performed gratuitously, and that the same facts take the case out of the rule declaring an executed consideration to be insufficient to support a promise. Whatever may be thought of the reasoning of some of the earlier English cases, it cannot be doubted that the conclusion that where there is a request, and continuous services of value are rendered to the person making the request, the consideration is a valid one, and will support a promise to pay for such services, although some of them were rendered prior to the request. 1 Wharton Cont., §

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515. In the case in hand the services were rendered before and up to the time of the execution of the note, and clearly come within the rule declaring a continuous consideration to be sufficient. 1 Chitty Cont. 16; 1 Pars. Cont. 468; Addison Cont. 16; Powell Cont., § 48; Comyn's Dig., title Assumpsit, B. 12; Pothier Oblig., Appendix, 19; *Loomis v. Newhall*, 15 Pick. 159; *Andrews v. Ives*, 3 Conn. 368; *Wiggins v. Keizer*, 6 Ind. 252; *Carroll v. Nixon*, 4 Watts & S. 517; *Bestor v. Roberts*, 58 Ala. 331.

The surrender, at the intestate's request, of the right or privilege of naming the appellant's child, was the yielding of a consideration. The right to give his child a name was one which the father possessed, and one which he could not be deprived of against his consent. If the intestate chose to bargain for the exercise of this right he should be bound, for by his bargain he limited and restrained the father's right to bestow his own or some other name upon the child. We can perceive no solid reason for declaring that the right with which the father parted at the intestate's request was of no value. It is difficult, if not impossible, to invent even a plausible reason for affirming that such right or privilege is absolutely worthless. The father is the natural guardian of his child, and entitled to its services during infancy, and within this natural right must fall the privilege of bestowing a name upon it. In yielding to the intestate's request, and in consideration of the promise accompanying it, the appellant certainly suffered some deprivation and surrendered some right. The rule is, that "It is sufficient if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking." Addison Cont., § 9; *Glasgow v. Hobbs*, 32 Ind. 440. Conceding that the intestate derived no benefit, still as the appellant suffered some detriment and yielded a right, there is a legal consideration.

The concession that the intestate secured no benefit cannot be justly made, for he himself determined that the act done by the appellant, at his request, was a benefit to him. It is not necessary that the consideration for a promise should be a property one. It is true that the courts and text-writers use the words "valuable consideration," but this is done for the purpose of distinguishing the consideration from a good one, that is, one based upon love and affection, and from one resting on a purely moral obligation. "It is a familiar doctrine," says the Supreme Court of Texas, in *Hendricks v. Snodiker*, 30 Tex. 296, "that there need be no pecuniary

benefit passing to the vendor to make a consideration valuable." In most of the cases cited in discussing the first branch of this case, the consideration was something else than one having a pecuniary or property value. Others may be added. Thus, in *Gurvin v. Cromartie*, 11 Ired. 174, the consideration was the undertaking of the plaintiff to take a wife and have a child born unto him. In *Adams v. Honness*, 62 Barb. 326, the consideration was the removal of the promisee to a place near the home of the promisor ; and this was also the consideration in *Halsa v. Halsa*, 8 Mo. 303, and *Rumbolds v. Parr*, 51 id. 592. In *Worrell v. First Presbyterian Church, etc.*, 23 N. J. Eq. 96, the consideration was the resignation of the position of pastor of a church. In Anson on Contracts, 64, cases are collected upon this general subject, and the author says that courts "will not ask whether the thing which forms the consideration does in fact benefit the promisor or third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him." We find scattered through the books cases where devises of property are made upon conditions having no pecuniary value at all, and yet they are always enforced ; and so we find men in life making subscriptions to colleges on condition that they shall bear their names, or endowing professorships upon condition that they shall be given their names, and so far as our observation has extended, the validity of such conditions has never been challenged. It is evident that the naming of a college professorship or the like has always been considered as a matter of importance and value, for to declare otherwise would be to affirm that courts and law-writers have for ages been solemn respecters of worthless trifles. It will not do to say that the bestowal of a name is a valueless act, and if once it be granted to be of some value, then in the absence of fraud and oppression it must be held to possess the value placed upon it by the contracting parties.

Cases are cited showing the importance of the question of consideration where fraud and imposition are imputed to the party asserting the contract, and to the rule declared in those cases we yield undoubting assent. But here there is no question of fraud, imposition or oppression. The case is before us upon the pleadings, and there is no charge of fraud, nor any allegation that corrupt acts were done or undue advantage taken. We are not considering the

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case upon the evidence, and there are no inferences to be drawn from proved facts, but we are required to do more than examine the allegations of the pleadings, and from them determine the rights of the parties. Few rules are better settled than that fraud is never presumed, and that a party who relies upon fraud as a cause of action, or ground of defense, must charge it in his pleadings. Where there is no such charge, and no facts constituting fraud are pleaded, courts cannot by any inferential process inject that element into the case.

Judgment reversed.

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(85 Ind. 318.)

Criminal law — once in jeopardy — plea of guilty by aures.

A person accused of murder had when arraigned pleaded not guilty. There were threats and danger of lynching which terrified him and his counsel, by reason of which, and at the urgent solicitation of his counsel, he withdrew his first plea and pleaded guilty, and was sentenced. Held, that he was entitled to a new trial.

CONVICTION of murder. The opinion states the case.

N. G. Buff, J. T. Pierce and D. T. Morgan, for appellant.

F. T. Hord, attorney-general, C. E. Matson, prosecuting attorney, W. W. Carter, G. A. Knight, C. H. Knight, and W. W. Thornton, for State.

ELLIOTT, J. This is an extraordinary case. The facts proved, the procedure adopted, and the relief sought are strange and unusual.

The facts stated and proved are these: In April, 1878, Josephine Sanders, the wife of the appellant, was slain by a pistol shot; at the time she was in the room alone with her husband, and he did not and could not give any account of her death; he was then, and had been for many years, addicted to the use of alcoholic

liquor and opium to such an extent that he had probably become insane; he was arrested shortly after the death of his wife; his case came on for trial; his counsel and many witnesses of unquestioned veracity testify that at the time of his trial he was insane; the homicide had aroused an intense feeling in the vicinity of the county-seat, where the killing was done, and the case put to trial; threats were made of lynching by a mob; counsel prepared an affidavit for delay, but feared to present it lest the mob should seize and hang the accused; the sheriff of the adjoining county came to the county-seat of Clay county and warned the sheriff of that county of imminent danger from an armed mob; a jury had been impanelled and a plea of not guilty entered, but so great was the threatened danger, that counsel, to save, as they believed, their client's life, withdrew the plea of not guilty, entered a plea of guilty, on which, without evidence, the jury returned a verdict of guilty, and a life sentence was immediately pronounced upon the verdict by the court; the accused was at once hurried to the train and conveyed to the State's prison. For the purpose of clearly exhibiting the situation at the time the plea of guilty was entered, we quote from the testimony of the gentlemen who were then appellant's counsel, and who are men of high character and undoubted integrity. One of them says: "As one of his counsel I urged and demanded of him a plea of guilty, with which I pledged myself to save his life; his counsel all concurred; Sanders always denying any knowledge of the homicide; his counsel were responsible for the act of pleading guilty, believing at the time that it was the only course by which his life might be saved." Another one of the counsel says that "the accused was bewildered and refused, but finally seemed to consent, and at last appeared to acquiesce in letting counsel take their own course; that the court was agitated and alarmed, and recommended and advised the plea of guilty." The turnkey of the jail, the sheriff of Clay and the sheriff of the adjoining county concur in stating that there was great and imminent danger of mob violence; one of the jurors says that there was intense excitement among the large crowd of people present at the trial; that he was himself stationed at the door of the court-house to signal to the jail any movement of the mob; that the judge was greatly excited, and said in the evening that he "had not drawn an easy breath until he had seen the train in motion with Sanders aboard." There is much other evidence as to

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the presence of a large number of angry and excited men, and it is also shown that they uttered threats of violence and appeared determined to seize and hang the appellant unless punishment was at once imposed upon him.

The relief prayed is that the judgment entered upon the plea of guilty may be vacated and the appellant put upon his trial in due form of law.

There are strong reasons in support of the appellant's prayer. All men are by our laws entitled to a fair trial, in absolute freedom from restraint and entire liberty from fear of threats and violence. It is almost a mockery to call that a trial, or a judicial hearing, which condemns an accused upon a plea of guilty forced from his reluctant counsel by threats of an angry and excited mob, and interposed because they believed that to proceed with a trial upon a plea of not guilty would result in the hanging of their client by lawless men. A man who makes a promissory note because of fear is entitled to relief. A man who executes a deed under duress is entitled to judicial assistance. A will executed under the influence of fear falls before the law. These are small things when compared with life and liberty, and yet in the eyes of the law they are null. If such things are null when procured by fear, or extorted by violence, should not a plea be so, when to have refused it would have been to put in jeopardy the life of the man arraigned upon a charge of felony? In many respects the facts of this case go far beyond that of ordinary cases of duress, for here the officers of the law, judge, sheriffs and jailers were inspired with fear of violence; counsel of age and experience, influenced by the appearances of danger which surrounded their client, secured from him a reluctant acquiescence to the plea of guilty. More than this, the accused, if not at the time absolutely insane and incapable of understanding what he did, was weak and enfeebled in mind, and as his counsel expresses it, "lost and bewildered."

That the case made is one entitling the appellant to some relief is clear, but whether the law vests the courts with power to grant it is by no means so clear. Unless the law, as it exists, confers this authority, then the courts do not possess it. Hard as the case may be and grievous as may be the suitor's situation, they can make no new law to fit his case. If a new law is needed it must come from the law making power.

The right to pardon is vested in the chief executive of the State,

and this it is suggested, is the source from which relief must be obtained in such cases as this. But if the courts have power to grant relief, the fact that the governor may pardon does not abridge a party's right to appeal to the courts for assistance. The power to pardon does not exclude the right to hear and determine; both powers may concurrently exist. Nor is a pardon always adequate relief. An innocent man suffering from an illegal sentence, procured by fraud or extorted by violence, may desire a trial and an acquittal which shall remove from his character the stain of guilt, and this the exercise of the pardoning power can not do. To pardon is to exercise executive clemency; it is an act of mercy. An acquittal is the vindication of a right, the award of justice. Again the executive may not feel warranted in turning a condemned criminal loose, and as he can grant no new trial, this he must do or deny a pardon. The court need not discharge, but may put the accused again to trial. We can not believe that the power to pardon was meant to cover every case of an, unjust conviction, where the accused had, without fault on his part, not availed himself of the right of appeal.

If our statute provides exclusive remedies for the relief of an accused, then of course, those remedies must be pursued, and our next inquiry naturally is, are such remedies provided?

There is the remedy by appeal; but this can not reach such a case as the one in hand. An appeal would have been unavailing.

The record showed a confession; for on the face of the record, such the plea appeared to be, and there were no objections or exceptions. It is evident that the statutory provisions concerning appeals in criminal cases can have no application to a case like this. Here there were no errors committed in ruling on pleadings or in conducting a trial. In truth there was no trial, and in law no confession; for a confession like any other act, extorted by violence or procured through fear, is without effect. If then there was in fact no trial, and in law no plea of confession, there was a condemnation without either a trial or a confession by plea. If it be correct to affirm that the plea procured by fear is of no effect, it inevitably follows that the sentence was pronounced where no hearing was had and no guilt acknowledged. It seems clear therefore that the statute concerning appeals is not applicable, and if not applicable, then it can in no sense be exclusive of other remedies, if any such there are.

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There is the remedy by a new trial. That can have no application to a case where there was no trial. Again, it cannot apply, because as the statute stood at the time of the appellant's sentence, the motion must have been made before judgment, and that, the record shows, would have been impossible in this case. No time intervened between the sentence and its execution. Once more this remedy cannot be meant for such a case as this, because the grounds for a new trial prescribed by the statute would not cover the wrong here committed, nor could it bring relief.

It is obvious that a motion in arrest of judgment cannot be appropriate, for the face of the record is fair, and in appearance all the proceedings are regular. A motion for a *venire de novo* is not a statutory remedy, but is a recognized one borrowed from the common law, and it, as is sufficiently obvious, can have no application.

We find then no statute applicable, and consequently none excluding other known and recognized remedies, if any such there are, not inconsistent with our Constitution and laws.

May we look to the common law? Our statute provides that among other laws, "The common law of England, and the statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth), and which are of a general nature, not local to that kingdom," and not inconsistent with the Constitution of the United States or of the State of Indiana, and not inconsistent with the National and State statutes, shall be the law of the State. It is plain that no provision of the common law which prescribes a remedy for relieving an accused, who has been forced to plead in confession by lawless violence, can be deemed in conflict with the Constitution of the State or Nation; for both these instruments are explicit in their commands that all accused persons shall have a public and impartial trial, and shall only be condemned by due process of law. Nor is there any statute, as we have seen, which can be deemed inconsistent with a common-law remedy which will reach a case like this.

The common law did not authorize the granting of a new trial in cases of felony. *Rex v. Bertrand*, 10 Cox C. C. 618; Harris Crim. Law, 406. The remedy of an accused in cases where the

court erred as to a matter of law was a recommendation to pardon, signed by the judges, and this was granted as a matter of course. *Reg. v. Murphy*, L. R., 2 P. C. 535. The remedy, where there was an error of fact, was by a proceeding called a writ *coram nobis*. This was a very common remedy in civil actions, but was seldom resorted to in criminal cases. Although rarely used in criminal cases, we find it conceded by courts and writers to be an appropriate remedy in criminal prosecutions as well as in civil actions. Judge Cooley, in a note to Blackstone's Commentaries, says: "In this chapter Sir W. Blackstone has considered only the modes by which a judgment might be reversed by writ of error brought in a Court of Appeal, and has stated that this can only be done for error in law. There is however a proceeding to reverse a judgment by writ of error in the same court, where the error complained of is in fact and not in law, and where of course no fault is imputed to the court in pronouncing its judgment. This writ is called the writ *coram nobis*, or *coram vobis*, according as the proceedings are in the King's Bench or Common Pleas, because the record is stated to remain before us (the king), if in the former, and before you (the judges), if in the latter, and is not removed to another court. In this proceeding it is of course necessary to suggest a new fact upon the record from which the error in the first judgment will appear; thus supposing the defendant, being an infant, has appeared by attorney instead of guardian, it will be necessary to suggest the fact of his infancy, of which the court was not before informed." In the note to *Jaques v. Cesar*, 2 Saunders, 100, the early English cases are cited, showing the scope, character and effect of the writ. The common-law doctrine is also discussed in Bacon Abridg., title Error; Comyns' Digest, title Proceeding in Error; 2 Tidd's Practice, 1136; 7 Robinson Pr. 149; Stephen Pl. 118. It is recognized in many of the States as forming a part of the law; it is so held in Alabama, *Holford v. Alexander*, 12 Ala. 280; in Arkansas, *Adler v. State*, 35 Ark. 517; s. c., 37 Am. Rep. 48; in Iowa, *McKinney v. Western, etc., Co.*, 4 Iowa, 420; in Kentucky, *Meredith v. Sanders*, 2 Bibb, 101; *Duff v. Combs*, 8 B. Monr. 386; *Combs v. Carter*, 1 Dana, 178; in Maryland, *Hawkins v. Bowie*, 9 Gill & J. 428; *Kemp v. Cook*, 18 Md. 130; in Michigan, *Teller v. Wetherell*, 6 Mich. 46; in Mississippi, *Fellows v. Griffin*, 9 Sm. & M. 362; *Keller v. Scott*, 2 id. 82; *Land v. Williams*, 12 id. 362; in Missouri, *Calloway v. Nifong*, 1 Mo. 223; *Ex parte*

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Toney, 11 id. 661; *Powell v. Gott*, 13 id. 458; in New York, *Higbie v. Comstock*, 1 Denio, 352; *Maher v. Comstock*, 1 How. Pr. 175; *Smith v. Kingsley*, 19 Wend. 620; in North Carolina, *Roughton v. Brown*, 8 Jones, 393; in Ohio, *Dows v. Harper*, 6 Ohio, 518 (27 Am. Dec. 270); in Pennsylvania, *Wood's Exr's v. Colwell*, 34 Penn. St. 92; in Tennessee, *Hillman v. Chester*, 12 Heisk. 34; *Patterson v. Arnold*, 4 Cold. 364; *Wynne v. Governor*, 1 Yerg. 169 (24 Am. Dec. 448); *Crawford v. Williams*, 1 Swan, 341; in Texas, *Mills v. Alexander*, 21 Tex. 154; *Moke v. Brackett*, 28 id. 443; *Giddings v. Steele*, id. 732; and in Virginia, *Reid's Adm'r v. Strider's Adm'r*, 7 Gratt. 76.

It is declared to be a part of the judicial procedure of the United States. *Pickett v. Legerwood*, 7 Pet. 144; *Strode v. Stafford*, 1 Brock. (U. S. C.) 162; *United States v. Plumer*, 3 Cliff. (U. S. C.) 1. In *Pickett v. Legerwood*, *supra*, it was said: "The cases for error *coram vobis* are enumerated without any material variation in all the books of practice, and rest on the authority of the sages and fathers of the law." Our text-writers agree in holding that the remedy exists, unless superseded or abolished by statute. *Powell Appellate Proceedings*, 107; *Curtis Com.*, § 178; *Freeman Judg.*, § 94. The author last named says: "The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication, made while some fact existed which if before the court would have prevented the rendition of the judgment, and which without any fault or negligence of the party was not presented to the court."

It is suggested in the argument of the counsel for the State that even at common law the writ *coram nobis* had fallen into disuse in criminal cases, and should not be regarded as part of the common-law procedure. All of the cases which discuss the question treat the rule as correctly laid down in the books of practice, and they all agree in declaring it applicable to criminal as well as civil cases. In the celebrated and bitterly contested case of *Regina v. O'Connell*, 7 Irish Law, 261, note 357, the writ was allowed, and no question made as to the right of the accused to demand it. The case was carried by appeal to the House of Lords, where after a stubborn fight, the judgment of the Irish court was reversed; but no doubt was intimated as to the right of Daniel O'Connell and his associates to sue out the writ. *O'Connell v. Regina*, 11 Cl. & F. 155, opinion,

p. 252. In *United States v. Plumer, supra*, Judge CLIFFORD examined the authorities with care, and held that the writ would lie in criminal as well as in civil cases (*vide* opinion, p. 59). It is true that the writ was denied in that case, not however because it was not a proper procedure in a court of competent jurisdiction, but because the court to which the application was made had no jurisdiction at all in criminal cases. In *Adler v. State, supra*, the writ was held to lie in a case in some of its features remarkably like the present. But we will not extend the discussion by commenting on the cases. A somewhat careful and full investigation has enabled us to find many cases affirming the right to the writ in both civil and criminal cases, where there is no statute abolishing or superseding it, but none denying that it exists at common law and in jurisdictions where there is no overruling statute.

It is held in well considered cases, that although there is a statute regulating proceedings in criminal cases, the writ is not abolished unless the statute expressly or by implication abrogates it or supplants it by some other remedy. This is so held with respect to writs *coram nobis*, by MARSHALL, C. J., in *Strode v. Stafford, supra*, and it is so held in *Cooke, Petitioner*, 15 Pick. 234. In speaking of the claim that the writ *coram nobis* cannot exist under the statute, COWEN, J., said, in *Smith v. Kingsley*, 19 Wend. 620: "There is no statute expressly and in terms repealing its power, nor any which does so by necessary implication. Mere silence or omission to regulate proceedings upon such a writ will not operate as a repeal. The power therefore remains as at common law, except as to the mere form *coram nobis resident*; because the fiction of the record remaining before the king himself is gone. We therefore have lost the name of the writ, but nothing more. *Camp v. Bennett*, 16 Wend. 48." This doctrine is in harmony with the well established principle that the statutory procedure blends with that of the common law. Mr. Bishop says: "The statute must be construed by the common law and in harmony with it, and by the common law must its defects be supplied." Statutory Crimes, § 366; Bishop Written Laws, § 142. This author also quotes with approval from our own case of *Walker v. State*, 23 Ind. 61, saying: "Again, where the common-law procedure has been to a greater or less extent superseded by statutes, 'the old rules are,' as observed in an Indiana case, 'continued in force, not inconsistent with the Criminal Code, and so far as they may operate in aid thereof.'"

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There are many instances in which our court has resorted to common-law methods of procedure where the statute is silent on the subject. *Marcus v. State*, 26 Ind. 101; *Bell v. State*, 42 id. 335; *Hardin v. State*, 22 id. 347; *State v. Berdett*, 73 id. 185; s. c., 38 Am. Rep. 117; *Wall v. State*, 23 Ind. 150; *Burk v. State*, 27 id. 430. But it is useless to multiply citations; there are comparatively few criminal cases that do not contain some reference to common-law principles. What for instance would be our situation upon the question of self-defense, if we could not look beyond our statute to ascertain what it is, and what the procedure is in cases where it is an essential element? In civil proceedings the rule is firmly settled that there are cases where relief will be granted, although there is no specific remedy provided by statute. *Bigelow Frauds*, 170; 3 Whart. Crim. Law, 3222; *Freeman Judg.*, § 99; *Dobson v. Pearce*, 12 N. Y. 156; *Molyneux v. Huey*, 81 N. C. 106; *Jarman v. Saunders*, 64 id. 367; *Huggins v. King*, 3 Barb. 616; *Stone v. Lewman*, 28 Ind. 97; *Johnson's Admr's v. Unversaw*, 30 id. 435; *Nealis v. Dicks*, 72 id. 374. That courts possess inherent powers not derived from any statute is undeniably true. Among these powers are the right to correct their records so as to make them speak the truth, to pass upon the constitutionality of statutes, to prevent the abuse of their authority or process, and to enforce obedience to their mandates. If it were granted that courts possess only such rights and powers as are conferred by statute, they would be mere creatures of the legislature, and not independent departments of the government. They are not mere creatures of the legislature, but are co-ordinate branches of the government, and in their sphere not subject to legislative control. *Deutschman v. Town of Charlestown*, 40 Ind. 449; *Cooley Const. Lim.* 114, 116; 2 *Story Const.* 377.

It is our opinion that the courts have the power to issue writs in the nature of the writ *coram nobis*, but that the writ can not be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law — the motion for a new trial and the right of appeal — and these very materially abridge the office and functions of the old writ. These afford an accused ample opportunity to present for review questions of fact, arising upon or prior to the trial, as well as questions of law; while at common law the writ of error allowed him to present to the appellate court only questions of law. Under our system all matters of

fact reviewable by appeal, or upon motion, must be presented by motion for a new trial, and cannot be made the grounds of an application for the writ *coram nobis*. Within this rule must fall the defense of insanity as well as all other defenses existing at the time of the commission of the crime. Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters.

Duress not only avoids all acts, but it also relieves from responsibility for crime. 1 Archb. Crim. Pr. 52; 1 Hale P. C. 56; 1 East P. C. 70. Necessity justifies many things as against an accused: it justifies the discharge of a jury, although the trial has been duly entered on, because of the illness of a judge or juror; it dispenses with essential averments in indictments. 1 Bish. Crim. Proc. 493; *Bescher v. State*, 32 Ind. 480; *Mixon v. State*, 55 Ala. 129; s. c., 28 Am. Rep. 695. In *Commonwealth v. Jailer, etc.*, 7 Watts, 366, a prisoner applied for a discharge under the provisions of a statute which entitled an accused to a trial or discharge at the second term of the court after his arrest. He had been afflicted with smallpox, and was recovering, but as the report says, "his aspect was so loathsome as to spread a general panic." The application for a discharge was refused, the court saying: "There is no doubt that necessity, either moral or physical, may raise an invariable exception to the letter of the *habeas corpus* act. A court is not bound to peril life in an attempt to perform what was not intended to be required of it." If, as against an accused, the government may invoke the doctrine of necessity and compulsion, may it not be invoked by him for the purpose of relieving himself from a plea wrung from him by fear of immediate and violent death? The assistance asked does not go to the extent of discharging without a trial, but the appeal is for relief from a plea of confession and for the award of an opportunity for trial. The application of the appellant brings to the knowledge of the court a fact, which if known would have prevented a conviction; and all the cases agree that where a new fact is suggested which would have prevented judgment, the accused is entitled to the writ *coram nobis*. We cannot conceive it possible — possible, we mean, in a legal sense, and under legal principles — that a court, with knowledge that a plea of guilty is forced from a prisoner by fear of death, would imprison him for life without a hearing or trial.

Duress is a species of fraud. Mr. Bishop says: "The common-

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law doctrine is familiar, that fraud vitiates every transaction into which it enters." 1 Bish. Crim. Law, 1008. It is a principle of wide application, that a judgment obtained by fraud may be annulled. The fraud however must be as to some act in securing jurisdiction, or as to something done concerning the trial or the judicial proceedings themselves; the rule has no application to cases of fraud in the transaction, or matters connected with it, out of which the legal controversy arose. Bigelow thus states the rule: "The fraud referred to must consist either in facts relating to the manner of obtaining jurisdiction of the cause, to the mode of conducting the trial, or to the concoction of the judgment, or in facts not actually or necessarily in issue at the former trial." Bigelow Frauds, 170. "Fraud," said DEGREY, C. J., in *Rez v. Duchess of Kingston*, 20 How. St. Trials, 355, 544, "is an extrinsic, collateral act; which vitiates the most solemn proceedings of courts of justice. Lord COKE says, it avoids all judicial acts, ecclesiastical or temporal." There is indeed no diversity of opinion as to the effect of the fraud, for it is agreed on all sides, as stated by Mr. Freeman, in speaking of judgments, that "upon proof of fraud or collusion in their procurement they may be vacated at any time." While there is entire harmony upon this point, there is some diversity of opinion as to whether a judgment can be collaterally impeached for fraud. Freeman Judg., §§ 99, 132; *Wiley v. Pavey*, 61 Ind. 457. In his discussion of this subject Mr. Bishop says: "In criminal cases, there is no question, that when fraud is practiced at the trial by the prosecutor, producing a conviction, a new trial will be granted on the prayer of the defendant." 1 Bish. Crim. Law, § 1009. As against the accused the rule goes much further, for it is held that if the judgment of acquittal is obtained through his fraud it is an absolute nullity. 1 Archb. Crim. Pr. 352, cases cited in *n*; 1 Whart. Crim. Law, § 546; 1 Bish. Crim. Pr. 352, cases cited in *n*; 1 Bish. Crim. Law, § 1010; 3 Whart. Crim. Law, § 3222; *Commonwealth v. Dascom*, 111 Mass. 404; *Commonwealth v. Alderman*, 4 id. 477; *Halloran v. State*, 80 Ind. 586; *Watkins v. State*, 68 id. 427; s. c., 34 Am. Rep. 273. In the case under consideration the fraud, it is true, is not that of the prosecutor, but it is such a fraud as deprived the appellant of the constitutional right to a fair trial by an impartial jury, and surely this entitles him to some relief, and under the elementary maxim that "there is no right without a remedy," there

must be some power to grant relief, and some remedy by which it can be secured. The practice in cases similar to this is unsettled (we have found no case exactly like it), and we think that the rule indicated by Mr. Bishop is the correct one. "When a proceeding," says this author, "is entirely fraudulent, having no sound part whatever, there is no collateral or direct effect to be given it; it is as though it had not been; only a party to the fraud is not permitted to rely on this imperfection. But practically most frauds relate only to some particular in the proceeding, — not vitiating, therefore, the whole." 1 Bish. Crim. Law, § 1011. The fraud in this case extends only to the plea and subsequent proceedings, and the appellant may therefore be rightfully put to trial upon the original indictment.

It is the general rule, that in order to sustain a verdict in a criminal case, there must be a plea. In *Johnson v. People*, 22 Ill. 314, it is said: "But it is believed that the practice is uniform, both in England and this country, in requiring the formation of an issue to sustain a verdict. Without it there is nothing to be tried by the jury." *Yundt v. People*, 65 Ill. 372; *Hoskins v. People*, 84 id. 87; s. c., 25 Am. Rep. 433. This is the doctrine of our own cases. *Tindall v. State*, 71 Ind. 314; *Graster v. State*, 54 id. 159; *Fletcher v. State*, id. 462. The rule goes so far as to declare that an arraignment is essential, and that until there has been an arraignment, the case is not ripe for trial. *Fletcher v. State*, *supra*; *Weaver v. State*, 83 Ind. 289; *Regina v. Fox*, 10 Cox C. C. 502.

No jeopardy attaches until the case is ripe for trial and the trial actually entered upon; and here the case was not ripe for trial, because the plea extorted from the appellant was null, and he was therefore not in legal jeopardy. The proceeding adopted by the appellant is, in its general features, and in its consequences, closely analogous to a motion for a new trial, and as a defendant, who takes a new trial granted at his own request, cannot claim that the finding set aside constitutes a prior jeopardy, he cannot do so in a proceeding like this. *Veatch v. State*, 60 Ind. 291.

We do not deem it necessary to discuss the question of the appellant's insanity at the time the plea of guilty was entered. There are cases holding that such a cause will support a motion for a writ *coram nobis*, or some proceeding of like character. *Adler v. State*, *supra*; *State v. Patten*, 10 La. Ann. 299; 1 Whart. Crim. L., 52,

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note *r*; 1 Bish. Crim. L., § 396, auth. n.; *McClain v. Davis*, 77 Ind. 419. All we deem it necessary to say upon this point is, that if the court below has determined this question before receiving the plea, an appellate court should be slow to interfere, if it indeed should interfere at all, and should only do so upon clear and convincing evidence. The question of the appellant's capacity is however a circumstance of importance to be taken into consideration, in connection with his conduct when a plea was entered, as this was, under circumstances threatening great and immediate peril. *Ewell Lead. Cas.* 771.

The case comes to us upon uncontradicted evidence that the plea of guilty was not the voluntary act of the accused, but was induced by fear of violence. There is no necessity therefore for another trial, upon this issue of fact. The fact of the existence of unlawful and violent compulsion, which deprived the appellant of freedom of will and liberty of action, is settled, and settled without contrariety of evidence or conflict of testimony, and upon that issue nothing remains for trial. With the undisputed facts before us, the only course open to us is to pronounce judgment of law upon the facts thus established. If the State had made an issue of fact, or offered opposing evidence, then another trial would have been necessary. It is no doubt true that the State may make an issue of fact by controverting the allegations in the motion of the accused, or by offering opposing evidence, and in the event that an issue of fact is joined or presented it is to be tried as other issues of fact are tried. Where however, as here, the State offers no evidence, and makes no denial, and the evidence of the accused is uncontroverted, there is no necessity for a trial. We have decided the case upon the motion and evidence adduced in its support, and not upon the demurrer to the complaint.

Judgment reversed, with instructions to vacate the judgment upon the indictment against the appellant; to permit him to withdraw the plea of guilty, and plead to the indictment; to put him upon trial in due form of law upon the indictment preferred against him, and for further proceedings in accordance with this opinion.

The clerk will issue the proper order for the return of the appellant.

Petition for a rehearing overruled.

So ordered.

DUNLAP V. WAGNER.

(35 Ind. 539.)

Tort — proximate cause.

The defendant, an unlicensed liquor seller, on Sunday, in violation of the statute, furnished D. intoxicating liquor to drink, upon which D. became intoxicated and unconscious. The defendant put D. in this condition into his vehicle, drawn by a gentle horse which he had borrowed of the plaintiff; and by reason of his intoxication and inability to manage the horse, it ran away and was killed. *Held*, that an action would lie for its value.

ACTION to recover the value of a horse. The opinion states the case. The defendant had judgment.

G. W. Cooper, and *Burns*, for appellant.

N. R. Keyes, for appellee.

ELLIOTT, J. The appellant was the owner of a gentle horse which he lent to Charles Dunlap, who hitched it with another, of like docile disposition, to a sleigh, and on Sunday, January 9, 1878, drove to the appellee's place of business; the latter, although not licensed as a retail liquor seller, kept intoxicating liquors for sale, and at the time named did sell and gave to Dunlap liquor in less quantities than a quart, and suffered him to drink it on his, appellee's, premises; the liquor so supplied Dunlap produced intoxication so great as to cause unconsciousness; while in this state, and incapable of controlling the horses, Dunlap was placed in the sleigh, and the horses started homeward by the appellee; because of the inability of Dunlap to manage the horses, an accident occurred which frightened them and they ran away, and appellant's horse received such injuries as caused its death.

The appellee violated the law in selling liquor to Charles Dunlap, for the law prohibits the sale of liquor on Sunday, and also forbids its sale in less quantities than a quart by unlicensed dealers. He was therefore a wrong-doer, and wrong-doers are responsible for injuries proximately resulting from their wrongful acts. A man who in violation of law makes another helplessly drunk, and then places him in a situation where his drunken condition is likely to

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bring harm to himself or injury to others, may well be deemed guilty of an actionable wrong independently of any statute. But we have a statute which provides that every person shall have a right of action for an injury resulting to person or property against one who shall, by selling intoxicating liquors to another, have caused the intoxication of the person by or through whom the injury is done. R. S. 1881, § 5323.

It is plain that a right of action exists against one who makes another drunk, for the recovery for such injuries as are done by the intoxicated person, "on account," as the statutory phrase runs, "of the use of such intoxicating liquors."

The right of action exists only in cases where the injury is the natural and proximate result of the wrong done in making drunk the person by whom it is caused, and the material inquiry is, whether the injury of which this appellant complains was the proximate and natural result of the appellee's wrongful act.

It is to be observed that the fact that Charles Dunlap was placed in charge of the horses is conceded by the demurrer, and the case is therefore that of one placing a man whom he has made helplessly drunk in a situation where injury might result to the property in his possession because of his incapacity to manage and care for it. We assume that horses require the management of an intelligent person in reasonable control of his mental faculties and physical powers, and this we do for the reason that all persons are presumed to know the natural and ordinary propensities and dispositions of such animals. Whart. Neg., § 100; Shear. & Redf. Neg., § 188; *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166; s. c., 40 Am. Rep. 230. If then horses need the control of one in possession of his faculties, the man who deprives another of the possession of them, and puts him in control of such animals, does an act which is likely to result in injury.

It is true that the injury resulting from the wrong complained of must be such as might have been reasonably foreseen and provided against, but it is by no means necessary that the precise injury which actually resulted should have been foreseen; for it is sufficient if it was of such a general nature as was likely to result from the act of the wrong-doer. It is never essential that it should be made to appear that the precise injuries which did occur could have been foreseen; it is enough, as Mr. Thompson says, if they are "such as are usual, and as therefore might have been expected."

2 Thomp. Neg. 1083, n.; *Billman v. Indianapolis, etc., R. Co., supra*; *Binford v. Johnston*, 82 Ind. 426; s. c., 42 Am. Rep. 509. A late writer says: "If his" (the wrong-doer's) "act has a tendency to injure some person of the general public, or many persons, and finally does, in the manner which was beforehand probable, cause such injury, it is proximate." 1 Sutherland Dam. 28.

There are cases bearing upon the precise question before us and we turn to them. In one of our own cases, *Schlosser v. State, ex rel.*, 55 Ind. 82, a complaint, charging that the husband was made drunk and thereby caused to beat his wife and neglect to provide for her, was held good, and in support of this ruling the cases of *Fountain v. Draper*, 49 Ind. 441; *Barnaby v. Wood*, 50 id. 405, and *English v. Beard*, 51 id. 489, were cited by the court. In the last of these cases it was held that the seller was liable to one who was assaulted and beaten by the intoxicated person. It needs no argument to show that the injury which this appellant suffered was much more direct and proximate than that sustained by the person upon whom the drunken man committed the assault and battery; for that horses left free from control are more likely to run away and do mischief than a drunken man to commit a crime, is very evident. In *Mead v. Stratton*, 87 N. Y. 493; s. c., 41 Am. Rep. 386, the defendant was the keeper of a hotel; the deceased bought liquor, drank it, and became so much intoxicated that he was helped into his buggy; he fell from it on his way and was killed, and it was held that his widow might have her action. The action was held maintainable in a case where a son was made intoxicated and in this condition so drove his father's horse as to greatly injure it. *Bertholf v. O'Reilly*, 8 Hun, 16. This case was affirmed in *Bertholf v. O'Reilly*, 74 N. Y. 509; s. c., 30 Am. Rep. 323. A like principle was involved and decided in *Aldrich v. Sager*, 9 Hun, 537, where a son-in-law, wrongfully made drunk, so recklessly drove a team as to cause the wagon to which they were attached to be upset, and his mother-in-law, who was with him in the wagon, to be injured. The case of *Volans v. Owen*, 9 Hun, 558, is in principle the same as those cited. The Supreme Court of Ohio goes very far upon this question as is proved by the cases of *Duroy v. Blinn*, 11 Ohio St. 331, and *Mulford v. Clewell*, 21 id. 191. Damages may be recovered for property squandered or destroyed by the intoxicated man, according to the rule declared in Iowa and Michigan. *Woolheather v. Risley*, 38 Iowa, 468; *Hemmens v.*

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Bentley, 32 Mich. 89. In *King v. Haley*, 86 Ill. 106; s. c., 29 Am. Rep. 14, it was held that one who is injured by a pistol shot, fired by the man to whom the liquor was sold, may maintain an action under the statute, and a like holding was made in *Bodge v. Hughes*, 53 N. H. 614. The intoxicated man in the case of *Hackett v. Smelsley*, 77 Ill. 109, drove a horse and buggy into the Sangamon river, and the action was held maintainable. Expenses for nursing a person made sick by the intoxication are recoverable. *Wightman v. Devere*, 33 Wis. 570; *Peterson v. Knoble*, 35 id. 80.

Appellee relies upon the cases of *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 id. 559, and *Backes v. Dent*, 55 id. 181. In the last named case the facts were, that the husband, while intoxicated, fell down a flight of stairs and was killed, and it was held, solely upon the authority of the two cases first named, and without discussion or reference to any of our other cases, that the action would not lie. In the second of the cases named, the intoxicated man lay down upon a railroad track and was killed by a passing train; and the action was held not maintainable, and this case, like the other, rests entirely upon *Krach v. Heilman*, *supra*. It is difficult, if not impossible, to reconcile the doctrine of the case under immediate mention with the earlier cases of *Fountain v. Draper*, *supra*; *English v. Beard*, *supra*, and *Barnaby v. Wood*, *supra*, or the later one of *Schlosser v. State*, 55 Ind. 82. Nor has the doctrine anywhere found favor; on the contrary, it has been disapproved. *Lawson Civil Remedy for Injuries from Sale of Intoxicating Liquors*, 44; *Monthly Jurist*, May, 1877; *Mead v. Stratton*, 87 N. Y. 493; s. c., 41 Am. Rep. 386. It is quite certain that it cannot be harmonized with the uniform current of judicial decisions, and it is clear that the New England highway cases, upon which it is chiefly founded, can hardly be in point upon such a question, owing to the peculiarities of the statutes of the New England States; and it is likewise certain that two of the cases cited as authority are now everywhere recognized as unsound. *Cooley Torts*, 76 auth. in n.; *Fent v. Toledo, etc., Ry. Co.*, 59 Ill. 349; s. c., 14 Am. Rep. 13; *Billman v. Indianapolis, etc., R. Co.*, *supra*. It is obvious that the doctrine of *Krach v. Heilman*, *supra*, ought not to be extended, and extended it must be, or it cannot embrace this case, for here there is an important element which was absent from that case, and that element is the direct and immediate act of the appellee in placing the drunken man in charge of appellant's property, know-

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ing his incapacity to control or care for it. There is here the direct connection with the cause which led to the injury sustained by the appellant. If to the case of *Collier v. Early, supra*, were added the element that the seller of the liquor led the drunken man upon the track and there left him in an unconscious state, exposed to the probable danger of death from passing trains, it would make it such a case as that now at our bar. It is this important element that distinguishes the present case from the cases relied on, and makes their doctrine wholly inapplicable.

It is argued by appellee's counsel, that there was an intervening agency between his client's wrong and the appellant's injury. We think the assumption an undue one, for there was, as we understand the facts, no intervening agency; but if it were granted that the assumption is a just one, the conclusion deduced by counsel is incorrect. An intervening agency does not absolve the wrong-doer. In concluding a long and careful review of the authorities in *Weick v. Lander*, 75 Ill. 93, the Supreme Court of Illinois said: "The principle announced is, that whoever does an unlawful act is to be regarded as the doer of all that follows." The general principle which controls upon this point is declared in our own cases of *Billman v. Indianapolis, etc., R. Co., supra*, and *Binford v. Johnston, supra*.

Judgment reversed.

MALONEY V. NEWTON.

(55 Ind. 505.)

Execution — exemption — waiver — bail in bastardy.

Replevin bail on a judgment in bastardy proceedings is entitled to the benefit of the exemption law.

THE opinion states the case.

L. M. Campbell, for appellant.

T. S. Adams, for appellees.

ELLIOTT, J. The single question presented by this record is this: Is a resident householder, who enters himself as replevin bail on a

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judgment obtained against a defendant in a prosecution for bastardy, entitled to the benefit of the exemption law?

The contention of the appellees is, that the bail is bound to the same extent as the principal, and that where the principal is not entitled to the benefit of the law, the bail cannot be. It is true that a replevin bail undertakes to pay the judgment according to its legal tenor and effect; thus, if the judgment replevied is payable without relief, then the bail so undertakes to pay it, and it may be collected from him without relief from valuation or appraisement laws. *Hutchins v. Hanna*, 8 Ind. 533; *Hardenbrook v. Sherwood*, 72 id. 403.

There is a plain and important difference between a case where one man undertakes to pay a judgment, which on its face provides how it shall be collected, and supplies a standard for the measurement of the bail's liability, and one containing no such provision. In the one case we need look only to the face of the judgment; in the other we must look elsewhere to ascertain the character of the burden assumed by the bail.

There is however a more important difference between the present case and the class of cases of which those cited are types. The right to exemption is one which the debtor cannot waive by contract. *Kneetle v. Newcomb*, 22 N. Y. 249; *Curtis v. O'Brien*, 20 Iowa, 376; *Moxley v. Ragan*, 10 Bush, 156; s. c., 19 Am. Rep. 61; *Denny v. White*, 2 Cold. 283. In *Maxwell v. Reed*, 7 Wis. 582, this rule is applied to a warrant to confess judgment, and it is held that a provision in the warrant waiving the benefit of the exemption cannot be enforced. The principles upon which these cases proceed are, in effect, the same as those which underlie and support our own cases of *McLane v. Elmer*, 4 Ind. 239, and *Develin v. Wood*, 2 id. 102, wherein it is held that a debtor can not waive stay of execution. We are, it may be well to say in order to avoid possible misconception, not to be understood as intimating that a debtor may not, after execution, waive his right to the exemption; what we hold is, that where the right of exemption exists it can not be waived by contract prior to the issuing of the execution. As a debtor cannot waive his exemption by contract, it follows that if the undertaking as replevin bail is to be regarded as a contract, no waiver arises from the undertaking itself. Unless the law annexes to such an undertaking the effect of a waiver of the right, there is no waiver. If a waiver exists at all it must arise by operation of law.

If we should hold with the appellee, that the bail is bound just as the principal is, then we should be forced to hold that where imprisonment is the penalty for the failure to pay the judgment, the bail may be imprisoned, and this conclusion is so palpably erroneous as not to deserve a moment's serious thought.

It cannot therefore be justly claimed that the undertaking in itself and by force of its terms waived the benefit of the exemption law ; nor can it be justly claimed that the bail is not entitled to it upon the ground that replevin bail are bound to the same extent and in the same manner as their principals.

The question comes to this : Does the law deprive one who becomes replevin bail for a defendant in a prosecution for bastardy of his exemption ?

It cannot be said that one who undertakes as replevin bail for another is guilty of any wrong, no matter what may be the character of the judgment against the principal. If this be true, and we are unable to perceive any ground upon which the proposition can be impeached, it must also be true that the replevin bail cannot be denied the benefit of the statute upon the ground that he has been guilty of a wrong. If then the bail perpetrates no wrong, he is not within the letter of the statute excluding from the benefit of its provisions one who commits a tort. What then is there to exclude him from asking that he be allowed that which the statute awards ?

If the question were one to be controlled solely by considerations of public policy, we could not say that public policy requires that the debtor and his family should be stripped of all means of living. But the laws indicate what the sovereign power esteems true policy. It is manifest that the Constitution, and the statute enacted in aid of its provisions, mean that the householder, who is himself free from wrong, shall not lose his statutory right, and thus deprive his family of the necessities of life. It has been repeated, time and again, by the courts all over the land, that the statute is a just and humane one, intended for the benefit of a debtor's family, and always to be liberally construed. A liberal construction would certainly not exclude a replevin bail, who is himself without fault, from its provisions. A literal adherence to its language would exclude only those who have themselves done a wrong, and we need not therefore resort to a liberal construction to save the rights of one who is without fault. All we need do is keep straight to the

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words of the statute. Public policy cannot overwhelm a constitutional statute, however much it may affect its construction ; but taking the language of the Constitution and of the statute as the expression of the will of the people and their representatives — and we can surely look to no higher sources for just ideas of public policy than these — enlightened public policy requires the just protection of the debtor and those dependent upon him.

Counsel have referred us to the case of *Whiteacre v. Rector*, 29 Gratt. 714 ; s. c., 26 Am. Rep. 420, wherein it is held that the exemption laws do not apply to replevin bail in criminal prosecutions, because the State is not bound by the statute, and we have found some other cases declaring the same doctrine. *Brooks v. State*, 54 Ga. 36 ; *Commonwealth v. Dougherty*, 8 Phila. 366 ; *Commonwealth v. Cook*, 8 Bush, 220 ; s. c., 8 Am. Rep. 456. On the other hand, we find cases declaring a different rule. *Green v. Marks*, 25 Ill. 204 ; *Hume v. Gossett*, 43 id. 297 ; *State v. Pitts*. 51 Mo. 133. We do not however think the question here is the same as that involved in criminal prosecutions, for there is a well defined distinction between the two classes of cases. It may well be granted that exemption cannot be claimed in cases where a fine is imposed as a punishment for the violation of law, and the question before us be in no wise affected. This we say because the criminal law and the civil law are, under our system, carefully kept separate and distinct.

There are well considered cases holding that the State is bound by the statute of exemption, although not expressly named. This is decided in some of the cases already cited, and in those to be presently noticed. We have accepted the English rule that the sovereign is not bound unless expressly named, but have taken it with its exceptions, and among these exceptions, as stated in the old books, are “statutes made for the maintenance of religion, the advancement of learning, and the good of the poor.” The case of *Gladney v. Deams*, 11 Ga. 79, carries the doctrine of exemption to a very great length, holding that the right exists as against the State in case of warrants for the collection of taxes. In the cases of *State v. Goddis*, 44 Iowa, 537, *Hume v. Gossett*, 43 Ill. 297, *Green v. Marks*, 25 id. 204, and *Loomis v. Gerson*, 62 id. 11, it is held that it applies in cases of judgments in favor of the State. In *State v. Pitts*, *supra*, it was held that the right existed in favor of a surety in a recognizance executed in a criminal prosecution. In a very recent case the question received careful investigation from

the Supreme Court of the United States, and it was held that statutes exempting homesteads applied to claims held by the United States. *Fink v. O'Neil*, 106 U. S. 272. These authorities settle the question that the statute binds the State as well as the citizen.

Prosecutions for bastardy are not criminal prosecutions, but are civil proceedings. *State v. Brown*, 44 Ind. 329; *State v. Evans*, 19 id. 92. The undertaking of the appellant is therefore in a civil proceeding and not in a criminal prosecution.

It becomes necessary to examine a little more closely the character of the appellant's undertaking, for by that his liability must be measured. It will not do, as we have shown, to affirm that his liability is in all respects the same as that of the principal. Nor do we think the cases go to any such extent. In *Elson v. O'Dowd*, 40 Ind. 300, it is said: "In the first place, we do not think that the fact that the undertaking of a replevin bail has the effect of a judgment confessed makes the liability of the replevin bail the same as that of the judgment defendant." We cannot therefore define the nature of the appellant's undertaking, by saying that it is the same as his principal's, for this would be to give as a definition that which is not true.

It is said in some of the cases, that the undertaking is a judgment confessed; and in *Vincennes Nat'l Bank v. Cockrum*, 64 Ind. 229, this doctrine was pushed to a great length — much beyond what the law warranted, and in consequence the case has been overruled. *Sterne v. McKinney*, 79 Ind. 578; *Vincennes Nat'l Bank v. Cockrum*, 80 id. 355. That the undertaking is not, in the strict sense of the term, a judgment confessed, is demonstrated in the case of *Eberwine v. State*, 79 Ind. 266. That it has the effect of the judgment confessed for many purposes, is no doubt true; but that it is the sentence or judgment of a court is not true. The truth is, that the entry of replevin bail is a statutory undertaking, voluntarily entered into by the bail.

By undertaking as replevin bail, the bail becomes a surety. If the undertaking is not valid as a recognizance of replevin bail, because of some defect in its execution, it may be enforceable as a contract. *Sanford v. Freeman*, 5 Ind. 129. The bail entitled to subrogation, and all similar rights of a surety. *Vert v. Voss*, 74 Ind. 565. The undertaking is founded upon a consideration. *Catherwood v. Watson*, 65 Ind. 576. Release of a lien will release him as it will any other surety. *Sterne v. Bank*, 79 Ind. 549.

Maloney v. Newton.

It is very plain from this enumeration of the elements of the undertaking of replevin bail that it is a contract. It would be preposterous to claim that one wrong-doer could become surety if the original wrong entered into his undertaking, and not much less so to insist that suretyship exists otherwise than by contract. The undertaking possesses all the essential requisites of a contract. It is what the elementary writers denominate a contract of record. 1 Chit. Cont. 3. The appellee concedes that it does possess all the elements of a contract, except that of parties, and that this element is absent because the judgment creditor does not assent to the undertaking. The answer to this is that the clerk is made, in a qualified sense, the agent of the judgment creditor, to receive the bail. The case is closely analogous to the case of redemption of property from sale, of the payment of judgments, of the payment of money into a court on a tender, and in such cases and many more of like character, the clerk is regarded as the agent, in a limited sense, it may be, of the parties.

The conclusion to which the sternest rules of logic carry us is that the liability of the appellant arises out of contract, and that he is entitled to his exemption. The result is not an evil one, for it does but bring the case within a statute which the National and State courts have, with a harmony closely approaching unanimity, proclaimed one of the wisest and most beneficent measures of modern legislation. In closing the opinion in *Fink v. O'Neil*, *supra*, MATTHEWS, J., after speaking of the statute and its operation, and explaining why it binds the sovereign, says that such statutes "shall be extended generally according to their words;" for civilization has no promise that is not nourished in the bosom of the secure and well-ordered household."

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PEOPLE V. FLANAGAN.

(80 Cal. 2.)

Criminal law — homicide in defense of property.

Homicide in defense of one's property is justifiable when necessary to defeat or prevent a felonious aggression thereon. (*See note, p. 54.*)

CONVICTION of murder. The opinion states the point.

Jo Hamilton and A. F. Jones, for appellant.

John Gale, district attorney, for respondent.

MCKEE, J. From a judgment of conviction of murder comes this appeal by the defendant, upon a transcript on appeal which contains only the judgment and charge of the court.

At the request of the district attorney the court below instructed the jury as follows: "To justify the commission of a homicide upon the ground that it was necessary in defense of one's property, it must be made to appear, by a preponderance of the testimony, that the person killed was manifestly endeavoring and intending to com-

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mit a felony. A bare trespass upon property does not justify or excuse a homicide." This instruction, we think, was erroneous.

It is undoubtedly true, as a legal proposition, that human life cannot be taken to prevent a mere trespass upon property. But it is equally true that every person has a legal right in defense of his property, to prevent the commission of a felony. For the purposes of defense and prevention every one is entitled to use whatever force may be necessary — even to the extent of taking the life of a felonious aggressor (*People v. Payne*, 8 Cal. 341), and a homicide committed under such circumstances is justifiable in law. "Homicide," says the Penal Code, "is justifiable when committed by any person in defense of person or property, against one who manifestly intends or endeavors by violence or surprise to commit a felony." Subd. 2, § 297, Pen. Code. In such a case the justification is not made to depend upon a combination of intent and endeavor to commit a felony, as erroneously stated to the jury. Either an intent or endeavor to execute such a design will be sufficient to justify resistance for prevention in defense of person or property. The law of self-defense is a law of necessity; and that necessity must be real or apparently real. A party acting under it may act upon appearances; and he will be justifiable in acting upon them, even though they turn out to have been false. Whether they were real or apparently real is for the jury, in a criminal case, to decide upon all the circumstances out of which the necessity springs. If from all the evidence in the case they should find that the circumstances were such as to excite the fears of a reasonable man, and that the defendant acting under the influence of such fears, killed the aggressor to prevent the commission of a felony upon his person or property, he would not be criminally responsible for his death, although the circumstances might be insufficient to prove, by a preponderance of the evidence, that the aggressor was actually about to commit a felony.

To justify the defendant in this case it was not therefore necessary for him to prove by a preponderance of evidence that the deceased was actually about to commit a felony upon him. It was sufficient if such a design was made to appear from all the circumstances attending the killing. The instruction as given was therefore erroneous, not only because it tended to deprive the defendant of the benefit of the doctrine of appearances, but also because it tended to deprive him of the doctrine of reasonable doubt.

In substance the jury were told that unless they found that the justification upon which the defendant relied was made to appear by a preponderance of the evidence, they must convict. But the testimony may have fallen short of such proof, and yet have been sufficient in itself, or in connection with the evidence of the prosecution, to create a reasonable doubt of the defendant's guilt, to the benefit of which the defendant was entitled in law. "It is a cardinal rule in criminal prosecutions," says Mr. Justice RAPALLO, in *Stokes v. People*, 53 N. Y. 181, s. c., 13 Am. Rep. 492, "that the burden of proof rests upon the prosecutor, and that if upon the whole evidence, including that of the defense, as well as of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt. The jury must be satisfied on the whole evidence of the guilt of the accused; and it is clear error to charge them when the prosecution has made out a *prima facie* case and evidence has been introduced tending to show a defense, that they must convict unless they are satisfied of the truth of the defense. Such a charge throws the burden of proof upon the prisoner, and subjects him to a conviction though the evidence on his part may have created a reasonable doubt in the minds of the jury as to his guilt. Instead of leaving it to them to determine upon the whole evidence whether his guilt is established beyond a reasonable doubt, it constrains them to convict, unless they are satisfied that he has proved his innocence."

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

Judgment accordingly.

ROSS and MCKINSTRY JJ., concurred.

NOTE BY THE REPORTER. — See *State v. Patterson*, 45 Vt. 306; s. c., 12 Am. Rep. 212; *Morgan v. Durfee*, 69 Mo. 449; s. c., 33 Am. Rep. 506. Wharton says (Cr. Law, § 100). "The right to property of all kinds may be forcibly defended when it is forcibly attacked, and the degree of force to be used is to be measured not by the value of the article, but by the degree of force used in the attack." And at § 501: "The owner of property has a right to use as much force as is necessary to prevent its forcible removal, or his exclusion from its use. But to kill a mere trespasser, not attempting the removal of the property nor any felony, is at least manslaughter; and if the killing be not in hot blood, is murder. The question is mainly, is an essential right of the party forcibly assailed? If so, he is entitled, in absence of adequate legal remedy, to use such force as is necessary to repel the attack."

The enactment of the California Penal Code, cited in the principal case, is but a re-enactment of the common law, which is thus laid down in *East's Pleas of the Crown*, 271: "A man may repel force by force in defense of his person, habitation or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defense."

PEOPLE V. HURLEY.

(80 Cal. 74.)

Criminal presumption — possession of stolen property.

To justify the inference of guilt from the possession of stolen property it must appear that the possession was personal. The bare fact that stolen hides were found in the defendant's barn, which was open to all, affords no presumption of his guilt, and until his declaration of ignorance is shown to be false, he is not bound to explain how they came there.

CONVICTION of larceny. The opinion states the facts.

SHARPSTEIN, J. The fact that the hides of the cattle alleged to have been stolen were found in the defendant's barn is not controverted. And we think that they were found there within a sufficiently recent period, after the loss of the cattle, to answer the requirements of the law in that respect.

But that is not all that is required to warrant the inference that the defendant stole the property. To justify that inference it must further appear that the possession was personal, and that it involved a distinct and conscious assertion of possession by him. And even then such possession may be explained. Whart. Cr. Ev., § 758. Now the facts as they appear in evidence in this case are that the cattle alleged to have been stolen were first missed on the 24th of October, 1879, and their hides were found in the defendant's barn on the 27th of November, 1879.

Within a few days after the cattle alleged to have been stolen were missed, and before the discovery of their hides, the defendant killed some cattle, which he, his wife, son and daughter testify were his own; and none of them are contradicted or impeached. Nor do we discover any thing suspicious in the conduct of the defendant as described by the witnesses who saw him at the time when he was killing these cattle, or disposing of their carcasses. And the cattle which he is proved to have killed were so unlike those alleged to have been stolen, as to preclude the idea of his having mistaken the latter for his own. He slaughtered them as he naturally would if killing his own; called in one neighbor to assist him; invited another to inspect his barn with him while

some of the beef was suspended there ; and disposed of it as he had been in the habit of disposing of beef before. The officer who arrested the defendant testifies that when the hides were brought out of the barn, the "defendant said that it was a put-up job on him ; that he knew nothing about the hides being in his barn."

The barn was never locked, and the neighbors went into it whenever they chose, which, one of the witness stated, was almost daily. The hides, when discovered, were hanging upon a pole, visible to all who might enter the barn. The defendant and several members of his family, together with one or more other witnesses, testify that they entered the barn repeatedly during the period intervening the loss of the cattle alleged to have been stolen and the discovery of the hides, and that during that intervening period they saw no hides there, although they thought they should have seen them if there. There is no conflict in the evidence upon any material point. As we view it, there is none, except the bare fact of the discovery of the hides of the missing cattle in the defendant's barn, which militates in any degree against him.

The assertion that the recent possession of stolen goods in a case of larceny raises a presumption that they were stolen, by the possessor, is not strictly accurate. The cases in which that has been said are those in which it also appeared that the possessor acquired the possession by his own act, or with his own concurrence or knowledge. If it had been shown in this case that the defendant placed these hides in his barn, or caused them to be placed there, or knew that they were there, or exercised any acts of possession over them, the case would be essentially different from what it now is. His explanation "that he knew nothing about the hides being in his barn" was the only one which he could give unless he did know something about their being there ; and the only way to prove his explanation false was to prove that he did know something about it. But there is no evidence which tends to prove that he did. If true, his explanation was as satisfactory as any ever given of the possession of stolen property ; and it was incumbent on the prosecution to prove it untrue before asking a conviction.

In Cowen & Hill's notes to Phillips on Evidence, 530, it is said, "that although a finding even in the prisoner's house is admissible, yet where there is not a more direct possession shown, and there are other inmates in the house capable of stealing the goods, this finding *per se* would not raise the presumption. Other circum-

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stances should be shown. And the reason is stronger of a finding in the prisoner's open shop." And in a note following that from which the above quotation is taken, it is said : " The better opinion seems to be that the presumption arising from possession alone is completely removed by the good character alone of the prisoner." The good character of the defendant in this case was testified to by witnesses who stated that they had known him fourteen years, and no attempt was made to rebut their testimony.

In *Crozier v. People*, 1 Park. Cr. 453, a part of the goods alleged to have been burglariously stolen were found in the unlocked trunk of C., on board of a steamboat. The court said that " the fact that a portion of the goods were found in the prisoner's trunk under such circumstances, is little if any stronger than it would have been had they been found in some other part of the boat."

And in a case where stolen tobacco was found in an out-house of the prisoner with tobacco belonging to him, and who claimed that the stolen property was his own, it was held that in the absence of proof that the tobacco did not resemble his own, a legal inference of the guilt of the prisoner could not be drawn from such possession. *State v. Smith*, 2 Ired. 402.

Burrill states the law as follows : " The possession must be exclusive. A finding of stolen property in the prisoner's house or apartment is equally competent in evidence against him, as a finding upon his person. But the house or room must be proved to be in his exclusive occupation. If the property were in a locked-up room or box, of which he kept the key, it would be a fair ground for calling upon him for his defense. But if it were only found lying in a house or room in which he lived jointly with others equally capable of having committed the theft, it is clear that no definite presumption of guilt could be made." We do not think that the bare fact of finding the hides of cattle that had been stolen in the defendant's barn, which is shown to have been open to any one who chose to enter it, in the absence of any evidence tending to prove that he knew or had any reason to suppose that such hides were there, sufficient to justify the inference which the jury must have drawn from it, in order to find the defendant guilty. And we also think that until his declaration that he knew nothing about the hides being there was shown to be false, he was not called upon to give any explanation as to how they came there. If he did not know that they were there, he could not explain how

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they came to be there. As we view it, this case is much weaker for the prosecution than either *People v. Norega*, 48 Cal. 123, or *People v. Swinford*, 57 id. 86, in both of which the judgments were reversed on the ground of insufficiency of the evidence to justify the verdict.

Judgment and order reversed and cause remanded for a new trial.

Reversed and remanded.

MORRISON, C. J., MYRICK and THORNTON, JJ., concurred.

CUMMINGS V. DUDLEY.

(60 Cal. 382.)

Contract to deliver specific articles — damages.

One who breaks his unconditional contract to deliver specific property is liable in damages for the value of the property.*

THE opinion states the case. The plaintiff had judgment below.

Terry, McKinne & Terry, for appellant.

Phillip G. Galpin, for respondent.

Ross, J. The complaint contains two counts. The first alleges that on or about the eleventh of October, 1878, at the county of Stanislaus, the plaintiff sold and delivered to the defendants a certain horse for the sum of fifteen hundred dollars in gold coin, which sum the defendants promised to pay plaintiff therefor, but have failed to pay any part thereof except the sum of one hundred dollars, which they paid on account.

The second count alleges that on the said eleventh day of October the defendants were indebted to the plaintiff in the sum of fifteen hundred dollars on account of the said horse delivered to defendants at their request, which horse, it is averred, was reasonably worth that sum, and no part of which has been paid, except the sum of one hundred dollars.

The proof on the part of the plaintiff is to the effect that de-

* See *Hyland v. Blodgett* (9 Or. 166), 42 Am. Rep. 730.

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defendants refused to give him fifteen hundred dollars in money for the horse, but agreed to give him seven hundred and fifty dollars in money and seven hundred and fifty dollars in horses to be appraised in a certain way; and that the plaintiff sold and delivered the horse to the defendants on those terms. By the contract of sale no time was fixed for the payment of the seven hundred and fifty dollars in money or the delivery of the horses.

From this statement it is obvious that neither count of the complaint stated the contract; for it is not true, as stated in the first count, that the plaintiff sold and delivered to the defendants the horse for the sum of fifteen hundred dollars in gold coin; nor is it true, as stated in the second count, that at the time of the sale, to wit, October 11, 1878, the defendants were indebted to the plaintiff on account of the sale and delivery of the horse in the sum of fifteen hundred dollars. The learned counsel for the respondent has referred us to a number of cases, and we have found numerous others, in which actions have been maintained for the money, or notes giving to the promisor the option to pay in specific chattels and where he has neglected to exercise the option. But in those cases the declaration averred what the contract was. Thus, *Plowman v. Riddle*, 7 Ala. 775, was an action in which the plaintiff declared on a promissory note for three hundred dollars, which contained a provision that the payors might discharge it in good leather of certain specified kind and at certain rates, and the court very properly held that the privilege was for the benefit of the payors, and that it was their duty, if they elected to deliver the leather in discharge of their contract, to give notice to the plaintiff of their readiness and willingness to do so. Having failed in that duty, the contract to pay the money became absolute.

In *Stewart v. Donnelly*, 4 Yerg. 177, the note was for eight thousand eight hundred and ninety-nine dollars and two cents, payable November 1, 1824, and contained a provision that it might be discharged in salt. The court properly held, that payment in salt not having been made by the day, the privilege was forfeited, and the plaintiff was not bound afterward to receive the salt.

Townsend v. Wells, 3 Day, 327, was an action on a note for eighty dollars, to be paid in good West India rum, sugar or molasses, at the election of the payee, within eight days after date. It was held to be unnecessary to aver that the payee had made his election and given notice thereof to the payor, as the latter was bound, at

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all events, to make payment within eight days in one of the articles specified, and that failing to do so, the contract to pay the money became absolute.

In *Wiley v. Shoemak*, 2 Greene (Iowa), 205, the note was made payable one day after date in flour. It was held that when due, the note became to the holder the same as a cash note, and that a demand of the flour was not necessary to enable the holder to recover.

In *Church v. Feterow*, 2 Penn. 301, it was held that when a note is given for the payment of a certain sum, in furniture or other specific articles within a stated time, the payor has an election to satisfy the note in such specific articles or in money, until the time of payment, but after that day is past, his election is gone, and the payee's right to demand money becomes absolute. So also was it held in *Vanhooser v. Logan*, 3 Scam. 388, where the note was for three hundred dollars and fifty cents, payable in cattle at a certain day.

Fleming v. Potter, 7 Watts, 380, was a suit on a note by which the defendants promised to pay forty dollars in castings or plows at their furnace, by a certain date. It was held, that to defeat the plaintiff's action, the defendants should have shown a readiness at the time and place stated, and a continued readiness to deliver the articles; otherwise plaintiff rightly recovered the money.

The other cases cited by counsel are similar. In all of them the complaint set out what the contract was, and inasmuch as it was made to appear that the respective defendants had not exercised their option to pay in the specific chattels within the time stated, the law rightly held them from that time forth bound to pay the money.

To the same effect are a number of other cases cited by Mr. Freeman in a note to the case of *Roberts v. Beatty*, 2 Pen. & W. 63; 21 Am. Dec. 424.

On the other hand, where according to the agreement of the parties the promisor is to deliver the specific property at all events, without any option on his part, and he fails to carry out the contract, we understand the correct rule to be that he is liable in damages for the value of the property. 3 Pars. Cont. 215; *Pinney v. Gleason*, 5 Wend. 393; s. c., 21 Am. Dec. 223.

In the case before us it appears from the plaintiff's own proof that the defendants were unwilling to pay fifteen hundred dollars

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in money for the horse, and that it was the distinct agreement of both parties that one-half of the purchase price was to be paid in horses. We therefore adhere to the views expressed when this case was before department one of this court, to the effect that the plaintiff ought to have counted on the agreement to deliver the horses, as well as the agreement to pay the money. The amount fixed in the agreement of sale, in lieu of which the horses were to be delivered, would be treated as liquidated damages, inasmuch as no time was fixed for the delivery of the horses, and no specified horses agreed on.

But while we hold to the views above expressed, we will affirm the judgment and order of the court below, because the proof on the part of the plaintiff as to the contract was not objected to as inadmissible under the pleadings nor on any other ground, and because from the case as made by the plaintiff and sustained by the jury and the court below, the judgment is for the right amount.

Judgment and order affirmed.

Order affirmed.

MCKINSTRY, THORNTON, and MYRICK, JJ., concurred.

SCHROEDER V. SCHWEIZER LLOYD TRANSPORT VERSICHERUNGS-GESELLSCHAFT.

(80 Cal. 487.)

Insurance — marine — change of ship — "connections."

It is an implied condition of marine insurance of freight that the ship shall not be changed without necessity or consent. Wheat was insured on a certain steamer "and connections," from San Francisco to Hong Kong. It was the custom to carry without transshipment, but in this case the cargo was unnecessarily transferred to other ships of the same company at Yokohama, and conveyed to Hong Kong, where it was lost. Held, that "connections" meant regular connections, and not an unusual substitution unanticipated at the time of the issuing of the policy, and that the policy was avoided.

ACTION on a policy of marine insurance. The opinion states the case. The plaintiff had judgment below.

Milton Andros, and Charles Page, for appellant.

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Sidney V. Smith & Son, for respondents.

THORNTON, J. This is an action on a policy of insurance to recover for a loss of three thousand nine hundred and fifty one sacks of wheat, shipped by the plaintiffs with other wheat in sacks at San Francisco, and destined for Batavia.

The cause was tried by the court, judgment was rendered for the plaintiffs, from which defendant appealed.

All the facts appear in the decision of the court below, which was as follows :

“The above-entitled action came on to be tried by the court, a jury having been expressly waived by the parties on the twenty-third day of July, 1879, and now the court, having considered the pleadings and the evidence, finds the following to be all the facts of the case :

“1. On the twelfth day of August, 1874, the defendant, a corporation, issued and delivered to one J. W. H. Campbell, on behalf of the plaintiffs, who were then and are now doing business under the firm name of Busing, Schroeder & Co., the policy of insurance, a copy of which is attached to the complaint.

“2. Subsequently, before the commencement of this action, said policy was assigned and transferred to plaintiffs who at the commencement of this action were and are now the legal owners and holders thereof.

“3. On said day plaintiffs shipped on board the steamship Colorado, then in the harbor of San Francisco, and belonging to the Pacific Mail Steamship Company, the four thousand five hundred and fifty-one sacks of wheat mentioned in said policy, and which were during all the times mentioned herein the property of, and owned by, the plaintiffs.

“4. The Colorado then proceeded to Yokohama, where the master of said steamship received instructions from said company to return to San Francisco, instead of going on to Hong Kong. The reason of these instructions was that the steamer Alaska, which should have sailed prior to that time from Hong Kong to San Francisco, was undergoing repairs at Hong Kong, and was unable to make the voyage and to carry the mails between said ports in the regular course of the business of said company. The agents of said company at Yokohama thereupon transshipped the said four thousand five hundred and fifty-one sacks of wheat from the Col-

orado into the steamships Sierra Nevada and Costa Rica, belonging to the company, by which steamships it was conveyed to Hong Kong.

"5. Six hundred of said sacks of wheat were thus placed on board the Sierra Nevada, and were by her and connecting steamers safely conveyed to Batavia.

"6. Three thousand nine hundred and fifty-one of said sacks of wheat, of the value of thirteen thousand eight hundred and eighty-seven dollars, were thus placed upon the Costa Rica and were by her transported to Hong Kong, where they were received by the agents and servants of the said company, and by them, as a matter of necessity, and in accordance with the established custom prevailing at Hong Kong, which was known to the defendants at the time of the issuance of the policy, placed and stored in a warehouse on the harbor front of Hong Kong, there to await the first opportunity to ship them to Batavia.

"7. While said three thousand nine hundred and fifty-one sacks of wheat were in said warehouse awaiting reshipment, and before any opportunity to ship them to Batavia had arrived, the said harbor of Hong Kong was visited by a typhoon, or storm of extraordinary violence, which drove the waters of the harbor up on to the land, so that they broke in the roof and windows of the said warehouse, drenched the said wheat with sea water, and flooded the interior of the warehouse to the depth of three or four feet.

"8. By reason of said flooding and drenching the said three thousand nine hundred and fifty-one sacks of wheat were so thoroughly soaked with sea water and rain, that the wheat began at once to sprout, and became swollen and heated to such an extent that it would have been impossible to transport it to Batavia. No vessel would have received it on board, as there would have been danger during the voyage of its ignition from spontaneous combustion; and if it had been taken to Batavia, it would have arrived there as manure, and not as wheat.

"9. The said three thousand nine hundred and fifty-one sacks of wheat were thereupon surveyed by the government surveyors at Hong Kong, and by their advice sold at public sale, for the sum of three thousand five hundred and forty-one dollars and ninety-two cents, on the twenty-second day of September, 1874.

"10. The custom and usage of the Pacific Mail Steamship Company, with reference to the voyages of their steamships between

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San Francisco and Hong Kong, with cargo laden for Hong Kong or Batavia, was for the vessel on which such cargo was taken at San Francisco to carry the same to Hong Kong, without transshipping it at Yokohama, at which port they touched or made connection with any other vessel or vessels, at the last named port for such purpose. This usage had existed, without interruption, since the first day of January, 1867, the time of the establishment of the company's line of steamers between San Francisco and Hong Kong, the only instance of such transshipment being that of the cargo in question. The defendant had knowledge of this custom, and charged a lower rate of premium on the policy sued on, because it expected that no transshipment of the wheat was to be made at Yokohama.

"And from the foregoing facts the court now finds the following to be its conclusions of law :

"1. The said three thousand nine hundred and fifty-one sacks of wheat were, while in the warehouse at Hong Kong, insured and protected by the policy from loss or damage by any of the causes enumerated therein.

"2. The said three thousand nine hundred and fifty-one sacks of wheat were totally destroyed.

"3. The cause of the destruction of said three thousand nine hundred and fifty-one sacks of wheat was a peril of the sea.

"4. The transshipment of wheat from the Colorado, at Yokohama, was justified by the circumstances and by the policy and contract of the parties, and did not avoid the policy.

"5. The division of the four thousand five hundred and fifty-one sacks of wheat, and the putting of part of it on one vessel, and part of it on another vessel, were justified by the circumstances, and by the policy and contract of the parties, and did not avoid the policy.

"6. The total destruction of the three thousand nine hundred and fifty-one sacks of wheat was an absolute total loss, and not a partial loss or a particular average within the meaning of the policy.

"7. By the policy, the wheat therein mentioned was not insured only during or upon the usual voyage performed by the steamers appertaining to said company, from San Francisco to Hong Kong, but was insured while it should be upon said Colorado or any other steamer with which the Colorado might anywhere connect, or to which she might anywhere transfer her cargo.

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"8. The 'connections' in said policy of insurance mentioned was not a connection in the first instance, to be made at the port of Hong Kong, by and between said steamship Colorado and some other vessel, but included the connection which was made by the Colorado with the Sierra Nevada and the Costa Rica at Yokohama.

"9. The plaintiffs are entitled to recover from the defendant the said value of the said three thousand nine hundred and fifty-one sacks of wheat, less the amount for which they were sold, with interest thereon at the rate of ten per cent per annum, from the twenty-second day of September, 1874, up to sixteenth day of April, 1878, and from that date at the rate of seven per cent per annum, amounting in all to the sum of fifteen thousand and seventy-one dollars and forty-one cents."

The policy was made part of the findings of fact by reference to it as attached to the complaint.

The wheat was insured at and from San Francisco to Batavia on board the steamer Colorado and connections, against perils of the seas, fires, pirates, etc.

As appears in the findings of fact, the wheat was shipped on the Colorado in the harbor of San Francisco, and it then proceeded to Yokohama, where the ship-owner transshipped the wheat from the Colorado to the steamships Sierra Nevada and Costa Rica, belonging to the same owner by which it was carried to Hong Kong.

This change was made, not from the fact that the Colorado had been in any way disabled or rendered unnavigable, or with the consent of the insurer, but from the fact that when it reached Yokohama the master received instructions from the owner to return to San Francisco instead of going on to Hong Kong (see fourth finding, where the fact is found, and the reason that these instructions were given to the master).

It is contended that this transshipment was unjustifiable, and its effect was to change the risk, and in consequence, the defendant insurer was discharged from its contract. If the contract was thus changed the defendant cannot be held liable. "It is an implied condition of the policy that the ship named in it should not, after the commencement of the risk, be changed without necessity or the consent of the underwriters; for such unnecessary or unsanctioned change of the ship would produce an alteration of the risk run by the underwriters, and therefore exempt them from their liability."

1 Arnould on Ins. 177. The author cites Emerigon, chap. xii, § 16,

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vol. 1, 419, 425 (ed. of 1827), and *Pothier Traité d'Assurance*, Nos. 68, 69, 70, 71.

As to insurance on goods, freights, profits, etc., the same author says: "That if either before the commencement of the voyage or during the course of it, the ship named in the policy be changed without necessity, or without the consent of the underwriters, they will be discharged from liability." 1 Arnould on Ins. 178.

The author then proceeds and gives a reason for the rule:

"So invariable is this rule, that it holds good even though the substituted ship may be of larger dimensions or greater strength than that originally named in the policy, for by the fact that a given ship is named in the instrument, the underwriter has a right to say that he had some peculiar reasons for insuring a risk on that very ship which should not apply to any other.

"On the same ground, if without consent or necessity, the cargo is either shifted from the ship named in the policy to one as good or better, or originally loaded on board of the latter instead of on board the ship named, and both ships perish on the voyage, yet the underwriter shall be discharged from all liability, for the policy never attached upon the goods loaded on board the substituted ship." Id. 178; 2 Pouson's M. Law, 276; *Bold v. Rotheram*, 8 Q. B. 781; *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 20.

If however the underwriters consent, or if the ship in the course of the voyage becomes so disabled as to become incapable, by any means at the master's disposal, of being repaired at all, so as to take on the cargo, the master may procure another ship in which to forward the cargo to its port of destination, and the liability of the underwriters of the goods will still continue; and they will be liable for any loss occurring subsequent to the transshipment. *Plantamour v. Staples*, 1 T. R. 611, note; s. c., 3 Dougl. 1; *Schieffelin v. N. Y. Ins. Co.*, 9 Johns. 21; 1 Phill. Ins. 485-6; *Treadwell v. Union Ins. Co.*, 6 Cow. 270; *Saltas v. Ocean Ins. Co.*, 12 Johns. 107; s. c., 7 Am. Dec. 290; *Abbott Ship*. (6 Am. ed.) 365; 3 Kent (5th ed.), 257. See also Lee's Law of Shipping and Insurance, 412.

The necessity which will justify such action on the part of the master only arises in case the ship is disabled by stress of weather, or other peril of the sea, from carrying on the goods to the place of destination. Lee's Law of Sh. and Ins., 412; Arnould on Ins. 185; *Shipton v. Thornton*, 9 Ad. and Ell., 336.

No such necessity appears in this case. The facts in relation to

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the transshipment appear in the fourth finding, and they were not sufficient to justify it.

But it is contended that such consent is implied and was given by the use of the word "connections" in the policy — the underwriters stipulating for indemnity as regards the steamer Colorado and its connections.

If such is the significance of this word, the change of ship is justified. This word is simple and clear in its meaning. It indicates the act of connecting with some means of carriage or forming a junction with such means. See Webster's and Worcester's Dictionaries, word "Connection."

It is evident that the contract of insurance was entered into with regard to a state of things as to the connections of the ship Colorado, existing at the time of the execution of the policy. Reference certainly was not made to a casual, unusual and unanticipated connection with a ship substituted for the occasion, upon a state of things temporary in its nature and unknown at the time that the contract was made. It surely was not in the mind of either of the contracting parties that the Colorado would be turned back when she reached Yokohama, for the reason that the Alaska was disabled from taking its place in the regular course of business of the company (owner), and was then undergoing repairs at Hong Kong. It does not appear, and therefore we can assume it as an established fact, that the parties did not know when the contract was made those facts concerning the Alaska. It further appears from the facts found that the only connections with the Colorado had were those at Hong Kong — for it is stated in the tenth finding of facts that the custom and usage of the owner, the Pacific Mail Steamship Company, with reference to the voyages of their steamships between San Francisco and Hong Kong with cargo laden for Hong Kong or Batavia, was for the vessel on which the cargo was taken at San Francisco, to carry the same to Hong Kong without transshipping it at Yokohama, at which port they touched, or making connection with any other vessel or vessels at the last named port for such purpose, and that this usage had existed without interruption since the first day of January, 1867, the time of the establishment of the company's line of steamers between San Francisco and Hong Kong, the only instance of such transshipment being that of the cargo in question. This in our judgment is enough to show that such were the connections and the only connections existing at the time that

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the policy was entered into — a connection to be made at Hong Kong.

Why should it be held that such were not the connections referred to in the policy? The word was used as of something then in being. We find something in being fully answering to the word used. The Colorado was spoken of in the policy as having connections. It did have connections at Hong Kong as found, and had no connections elsewhere. Why are not these the connections mentioned in the policy, and not any such temporary connection availed of and created on and for the occasion by reason of an exigency which had just occurred, and which neither of the contracting parties was aware of at the time they entered into the contract of insurance?

Certainly we are justified in holding that the parties contracted with reference to a state of things known, and would not be justified in holding that they contracted with reference to a state of things unknown, unanticipated and temporary in its nature. If they had any intention to contract with reference to a change in the usual course, it might have been easily and clearly expressed in the contract.

But it is said that the plaintiffs had no knowledge of the custom and usage found in the tenth finding of fact. If they did not, it was their own fault. They were in effect told by the use of the word in the policy, that there were connections of the Colorado. The use of the word put them on inquiry. If they did not know it, certainly they would have inquired. But surely they knew what they were contracting about. They were contracting about the connections of the ship Colorado, and we think they should not be held to have been ignorant of them. It is not averred in the pleadings that they did not know it. If they did not, it might be claimed that it was a mistake on their part — whether of fact or law, it is unnecessary to say. If a mistake of fact or of law, it might have the effect of releasing them from the obligation of the defendant, or create a new one binding it. If the contract was not the contract they entered into, they should have proceeded to have it reformed. Not having done so, it must be construed as it is.

Nor does it make any difference that the words "custom and usage" are used in the finding with regard to this matter. The words are used to indicate a course of business pursued by the owners of the ship Colorado for a series of years and establishing a

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state of things referred to in the policy of insurance as existing at the time it was signed and delivered. It would not be proper to hold of this that it was a mercantile custom or usage, which did not bind the plaintiffs, because there is no finding that they were aware of it. It signifies a course of business of a particular line of steamships with reference to which a contract was made (1 Greenl. Ev., § 292; *The Schooner Reeside*, 2 Sumner, 567), referred to in the written contract in such language as to show to men of but little experience in business matters that a course of business in existence was alluded to and meant. To come to any other conclusion would be to hold that the plaintiffs did not know what they were contracting about, a conclusion which nothing appearing in the record indicates, and from which the law withholds any justification.

This course of business had existed from January, 1867, to the time the policy was executed, which was on the 12th day of August, 1874, more than seven years before the date just mentioned. Under the pleadings evidence should be received to show the meaning of the word "connections," but not to show that the plaintiffs did not know what that meaning was. 1 Greenl. Ev., § 592; *Schooner Reeside*, *ut supra*.

The seventh and eighth conclusions of law are not proper deductions from the facts found. We understand them as conclusions of law—as constructions of the instrument under the facts found, and not as findings of fact. If they were findings of fact they would be inconsistent with other findings, notably the tenth. As conclusions of law they are not justly deducible from the facts.

The contract was made with reference to a voyage of the Colorado to Hong Kong, where a connection would be made by a change of ship from that port to Batavia, unless the steamer became disabled and was rendered unnavigable, when a change of ship might have been made at Yokohama. Such change at the port just named, might also have been properly made with the consent of the underwriters. Neither of these occurred, and therefore the change of ship was not allowable. The risk was changed, and the underwriters might well say *non in hac foedera veni*. Whether the risk was increased or diminished by the change, the result is the same. The terms of the contract do not allow it, nor does the law.

The loss at Hong Kong occurred subsequent to the change of

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ship, and under the terms of the policy, the defendant was not responsible for any such loss occurring after that event. As the result here reached is conclusive, it is unnecessary to consider the other questions which were so ably discussed on the argument.

The judgment should be reversed and the cause remanded to the Superior Court of the city and county of San Francisco, with a direction to enter judgment for the defendant, and it is so ordered.*

So ordered.

SHARPSTEIN and MYRICK, JJ., concurred; THORNTON, J., dissented.

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(60 Cal. 581.)

Evidence — reading scientific book to jury.

On the argument of a murder trial the district attorney, against objection, was permitted to read to the jury extracts from "Browne's Medical Jurisprudence" on the subject of insanity. There was no evidence that it was standard or scientific. *Held*, error.†

CONVICTION of murder. The opinion states the case.

Darwin & Murphy for appellant.

A. L. Hart, attorney-general, for respondent.

McKINSTRY, J. The district attorney, in his closing argument to the jury, said he would read, "as a portion of his argument," from a book called "Browne's Medical Jurisprudence of Insanity." The bill of exceptions proceeds: "No testimony had been introduced to show that this was a recognized work or standard authority, or that it was a scientific work. The defense objected to said book, or any part thereof; or to any opinion of said alleged writer, on the ground that it had not been established to be a scientific work or a standard recognized authority, and that it was incompetent. The court overruled the objections, and the defense then

* Subsequently this direction was modified by ordering a new trial.—*Bar.*

† See *People v. Hall* (48 Mich. 483), 43 Am. Rep. 477.

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and there duly excepted. And the district attorney did read from said book various sections thereof, commenting upon and treating of the subject of insanity, and sustaining the prosecution's theory of the case. An expert has sometimes been defined to be a witness who testifies to conclusions from facts, while an ordinary witness testifies only to facts. Mr. Wharton thinks this definition not sufficiently exact, since no witness called to facts reproduces them precisely as they exist ; more or less of inference being mingled with almost every detail of ordinary observations. "The true distinction is this, the non-expert testifies as to a subject-matter readily mastered by the adjudicating tribunal ; the expert to conclusions outside of such range. The non-expert gives the result of a process of reasoning familiar to every-day life ; the expert gives the result of a process of reasoning which can be mastered only by special scientists." Crim. Ev. 404. Whatever the exact distinction, it is well settled that where the object is to ascertain whether a supposed case is to be regarded as indicating insanity, only experts in insanity are to be called, since only experts are competent to describe the differentia of insanity scientifically. Crim. Ev. 417, cases cited.

But the question in the particular case "sane or insane," is a question of fact for the jury. The expert is called to assist the jury in reaching a just conclusion ; his testimony is necessarily subject to the supervision of the jury. They must determine not only whether the hypothetical case on which his opinion is based is the case before them, as established by credible testimony, but must consider the reasons he has given for his opinions, and by his whole testimony test his credibility and the correctness of his judgment. Inasmuch as the circumstances, on which the jury are to determine the weight to be given the opinion of an expert, are more numerous and complicated than those by reference to which they are to decide on the consideration to be accorded to the statements of a witness with respect to facts, and inferences involved, if any, which are within the reach of those possessed of no special or scientific acquirements, it follows that it is peculiarly important that a defendant charged with crime should be "confronted" by the expert witnesses against him, and that they should be cross-examined in his presence. But where the opinions of a writer as to the presence or absence of insanity, upon facts more or less analogous to those claimed by the prosecution or defense to be established in the case,

are permitted to go to the jury, the writer is not sworn or cross-examined at all. Such evidence is equally objectionable, whether introduced by the people or by the defendant. If held admissible, the question of insanity may be tried, not by the testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories. In the case before us too there was no evidence that the work from which the district attorney read "various" sections was a standard authority in the medical profession, or that the author was an expert.

Medical books are not admissible as evidence. The contrary was at one time held in Iowa and Alabama. The Iowa decision *Bowman v. Woods*, 1 G. Greene, 445, was based upon the idea, that inasmuch as the opinions of medical witnesses are formed in part upon the books they may have read, the books themselves are "better evidence." A reference to what is said hereafter as to the reasons for rejecting such books will point out the fallacy on which the conclusion of the Iowa court was based. In *Bowman v. Woods* it was conceded that the admission of such books is not in conformity to the prevailing decisions. The Alabama case *Stoudenmeier v. Williamson*, 29 Ala. 558, will be hereinafter noticed.

Medical witnesses, as observed by Briand, "do not usurp the functions, but serve to enlighten the conscience of the judge and jury." The practice is to ask the opinion of the expert, upon a hypothetical state of facts, but not to permit him to quote from books of authority in his profession to fortify his opinion. Against this exclusion of written authorities medical men have protested very vehemently. As long ago as the trial of Spencer Cowper, Doctor Crell remonstrated with the bench when it was intimated that the practice of reading from books was improper. In Beck's *Medical Jurisprudence* (vol. 2, p. 963), is a citation from an article in the *Edinburgh Medical and Surgical Journal*, where the editors say: "It appears to us no one can follow this advice" (not to read from medical treatises in giving testimony) "without compromising the right and dignity of his profession as well as the force of his evidence, for it would not be difficult to show that medical evidence is little else than a reference to authority." But one of the editors of the Revision of Beck by Gilman shows (vol. 2, p. 963), that the effect of the rule is not to deprive parties of medical or scientific evidence, but that TINDALL's dictum, in *Collier v. Simpson*, 5 C. & P. 74, opened the door wide enough to satisfy any reasonable man. "You may

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ask," said that judge, "the witness whether in the course of his reading he has found this laid down ; you may ask him his judgment and the grounds of it, which may in some degree be founded upon books as part of his general knowledge."

A similar rule obtains with respect to a witness called to prove a foreign law; he should state, on his responsibility, what the foreign law is, and not read fragments of a foreign code. *Cocks v. Purday*, 2 Carr. & K. 269.

But while a witness cannot be permitted to read, as independent proof, extracts from books in his department, he may refresh his memory, when giving the conclusions arrived at in his specialty, by turning to standard works. 1 Whart. Ev. 438. And as we shall see hereafter, it would seem to have been held in Wisconsin that a witness having cited scientific authorities, they may be put in evidence to discredit him.

Quotations from medical books are not admissible as evidence when offered independently, or when read by witnesses. It follows that counsel ought not to be allowed to read such to the jury; *a fortiori* when they are not proved to come from works of standard authority in the profession. A general history may be read from, but this is only to refresh the memory of the court as to something it is supposed to know. So under appropriate restrictions, domestic law books are permitted to be read to the jury. The court can always correct the counsel as to his law, or the application of it. But the opinions of medical experts are in their nature facts, to be established by living witnesses. They cannot be proved by hearsay alleged to come from those not present, and not even shown to be competent to express scientific opinions. Nor are they established by the mere statement of counsel.

The full report of *Queen v. Crouch*, 1 Cox's Cr. Cas. 94, is as follows :

"The prisoner was indicted for the willful murder of his wife, and the defense set up was that of insanity. Clarkson, for the prisoner, in his address to the jury, attempted to quote from a work entitled 'Cooper's Surgery,' the author's opinions on the subject. ALDERSON, B., thought that he was not justified in doing so. Clarkson — I quote it, my lord, as embodying the sentiments of one who has studied the subject, and submit that it is admissible in the same way as opinions of scientific men on matters appertaining to foreign law may be given in evidence. Alderson, B. — I should not

allow you to read a work on foreign law. Any person who was properly conversant with it might be examined, but then he adds his own personal knowledge and experience to the information he may have derived from books. We must have the evidence of individuals, not their written opinions. We should be inundated with books if we were to hold otherwise. Clarkson — I shall prove the book to be one of high authority. Alderson, B. — But can that mend the matter? You surely cannot contend that you may give the book in evidence, and if not, what right have you to quote from it in your address, and do that indirectly which you would not be permitted to do in the ordinary course? Clarkson — It was certainly done, my lord, in *Naughton's* case. Alderson, B. — And that shows still more strongly the necessity for a stringent adherence to the rules laid down for our observance. But for the non-interposition of the judge in that case, you would not probably have thought it necessary to make this struggle now."

And in *Regina v. Taylor*, 13 Cox Cr. Cas. 77, it was held: "Cases cited in books on medical jurisprudence are not admissible even to form part of an address to the jury." Counsel for defense, in addressing the jury, proposed to read from Taylor's Medical Jurisprudence. BRETT, J., said: "This is no evidence in a court of justice. It is a mere statement by a medical man of hearsay facts of cases at which he was in all probability not present."

To the same effect are the American cases in which the question is fully considered and decided. In *State v. O'Brien*, 7 R. I. 338, the court said: "The book offered to be read to the jury was not admissible as evidence. No evidence in the nature of parol testimony could properly pass to them, except under the sanction of an oath; and upon this ground books of science are excluded, notwithstanding the opinion of scientific men that they are books of authority and valuable as treatises. Scientific men are permitted to give their opinions as experts, because given under oath, but the books which they write containing them are, for want of such oath, excluded."

The suggestion, that such books may be read "as part of the argument of counsel," did not receive much consideration from Chief Justice SHAW, in *Ashworth v. Kittridge*, 12 Cush. 193. That distinguished judge there said: "The court are of opinion that it was not competent for counsel for the plaintiff, against the objection of the other side, to read medical books to the jury.

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* * * We consider the law to this effect to be well settled, both upon principle and authority. When books are thus offered, they are, in effect, used as evidence, and the substantial objection is that they are statements wanting the sanction of an oath ; and the statement thus proposed is made by one not present and not liable to cross-examination. If this same author were cross-examined and asked to state the grounds of his opinion, he might himself alter or modify it, and it would be tested by a comparison with the opinions of others. Medical writers, like writers in other departments of science, have their various and conflicting theories, and often sustain and defend them with ingenuity. But as the whole range of medical literature is not open to persons of common experience, a passage may be found in one book favorable to a particular opinion, when perhaps the same opinion may have been vigorously contested, and perhaps triumphantly overthrown by other medical writers, but authors whose works would not be likely to be known to counsel or client, or to court or jury. Besides medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning in the general use of the language. From these and other causes, a person not versed in medical literature, though having a good knowledge of the general use of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author. Whereas a medical witness would not only give the fact of his opinion, and the grounds on which it is formed, under the sanction of his oath, but would also state and explain it in language intelligible to men of common experience. If it be said that no books should be read except books of good and established authority, the difficulty at once arises as to the question what constitutes good authority; more especially whether it is a question of competency, to be decided by the court, whether the particular book shall be received or rejected; or a question of weight of testimony, so that any book may be read, leaving its weight, force, and effect to the jury. Either of these alternatives would be attended with obvious if not insuperable objections."

And in *Commonwealth v. Wilson*, indicted for murder, 1 Gray, 338, the learned chief justice also said : "Opinions on the subject of insanity cannot be laid before the jury except under the oath of persons skilled in such matters. Whether stated in the language of the court or of the counsel in a former case, or cited

from the works of legal or medical writers, they are still statements of fact and must be proved on oath."

These views are reaffirmed in *Washburn v. Cuddihy*, 8 Gray, 431, and in *Commonwealth v. Brown*, 121 Mass., 81. So also it was held in *Commonwealth v. Sturtivant*, 117 Mass. 139; s. c., 19 Am. Rep. 401, that an expert should not be allowed to read extracts from a work on medical jurisprudence.

Dicta are to be found in the reports of the courts of several of the States, which, disconnected from the context, would seem to support the proposition that counsel may be permitted to read from medical works of established credit in the profession "as part of his argument." But in one only of the cases, so far as we have been able to find, was it decided that this practice was proper, such decision being necessary to the conclusion reached by the court.

In *Yoe v. People*, 49 Ill. 412, it was said that where the attorney for the people, against the objection of the prisoner, read copious extracts from medical works, the court (without special request on the part of the prisoner) should have instructed the jury that such books are not evidence, but theories simply of medical men. Even if we should accept this as law, the judgment in the present case must be reversed, since the court below did not so instruct the jury. In *Yoe v. People* the reading of such books by the attorney for the people (in the absence of the instruction mentioned) was held to be error, and the judgment was reversed. In our view the court came to the proper conclusion — that error had occurred.

But books treating of insanity contain more than abstract speculations or general expositions of the science of medicine as applicable to mental diseases. They contain reported cases and opinions as to the effect to be given to asserted facts in determining the presence or absence of insanity; statements of the views and opinions of their writers, which partake of the nature of facts in the same degree as do the opinions of expert witnesses who are subject to cross-examination. *Harvey v. State*, 40 Ind. 516, was a case in which it was held not to be error for the trial court to permit counsel to read from a book purporting to be a medical work, the court instructing the jury "that the extract was to be regarded not in anywise as evidence," etc. The objections to the practice so clearly pointed out by Chief Justice SHAW and others do not seem to have occurred to the judges; and the court in *Harvey v. State* supposed that any evil which might arise from it would be over-

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come by the direction to the jury to disregard the extract as evidence. In the case at bar, as we have seen, the court below did not so instruct the jury. It has been held here that ordinarily a judgment will not be reversed because of the omission of the trial court to give a certain instruction unless the instruction was requested. But the rule certainly would not be applicable to a case in which counsel should be permitted to state facts not in evidence to a jury, against the objection of the opposite party. See *People v. Taylor*, 59 Cal. 640. Here the district attorney was permitted to read the opinions of one whose opinions (even if we assume the book to be of recognized authority) were like the opinions of experts upon the witness stand, in the nature of facts.

We do not think *Harvey v. State* was well decided; but if it can be considered law, it will not justify an affirmance of the judgment in the case now before us. In *Legg v. Drake*, 1 Ohio St. 286, the bill of exceptions did not show that the passage from Youatt's work on "Veterinary Surgery," which counsel was prevented by the court from reading to the jury, had any relevancy to the cause on trial. The action of the court below in refusing to permit it to be read, was sustained for this reason; as if the Supreme Court had said: "Assuming that passages from such works may properly be read, they should at least have some bearing on the issue being tried." What is said in the opinion of the propriety of the practice, is mere *dictum*. Id. 289. The bill of exceptions before us shows, that the sections read by the district attorney to the jury, from Browne's work, were relevant. He read "various sections thereof, commenting upon and treating of the subject of insanity and sustaining the prosecution's theory of the case." Moreover in *Legg v. Drake*, the court only said: "Although unlimited license in range and extent is not allowed to counsel in their addresses to the court and jury, yet no pertinent and legitimate process of argumentation, within the appropriate time allowed, should be restricted or prohibited. And it is not to be denied, that a pertinent quotation or extract from a work on science or art, as well as from a classical, historical or other publication, may, by way of argument or illustration, be not only admissible, but sometimes highly proper. * * * It would be an abuse of this privilege however to make it the pretense of getting improper matter before the jury as evidence in the cause." A pertinent quotation, used by way of illustration, is a very different thing from a report of facts connected with

a particular case, and the opinion of an author thereon that they did not indicate or establish insanity; a different thing from the reading the opinion of a medical writer as to the effect of particular facts upon the determination of the question of insanity. Such must be presumed to have been the nature of the matters read by the district attorney in the present case, since they sustained the prosecution's theory of "the case," this case. The ruling in *Wade v. De Witt*, 20 Tex. 401, was based upon a similar bill of exceptions to that before the Ohio court, in *Legg v. Drake*, and was to the same effect. In *City of Ripon v. Bittel*, 30 Wis. 619, the bill of exceptions did not show for what purpose a certain treatise on surgery had been admitted. *Non constat*, said the court, but a medical expert had stated that the treatise sustained his conclusion, and the book was admitted as evidence in the nature of impeaching testimony, to show that the witness was mistaken.

Mr. Bishop, in his work on Criminal Procedure, section 1190, says: "An expert may testify to what he has learned, not merely from personal experience and observation, but also from books, and may give an opinion derived from reading and study alone. But it does not follow that the books themselves are evidence. We have seen that the law of the case should be given to the jury by the judge and not through law books; because the books state the law abstractly, while the jury are to be instructed upon the rules governing the particular facts. For the like reason it is the better doctrine that no book of science, or other book of the sort, however high or well attested its authority, should be submitted to the jury. Yet equally in the judge's charge to the jury, and in the testimony of experts, and even in the arguments of counsel, passages from standard books, explained and applied to the case in controversy, are under limitations varying in some degree in our different courts, permitted to be read."

We need not here pause to inquire, whether in view of the clause in our Constitution which prohibits any charge as to facts, a California judge would be permitted to determine what books are "standard authorities" in the medical profession; to read from such, and to explain and apply their contents. With respect to the statement that passages from standard books may be read by witnesses, and by them explained and applied, "under limitations

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varying in some degree," the language employed by the very able writer indicates how difficult he found it to derive any definite rule from the instances where such practice had apparently been permitted. The cases cited by Mr. Bishop are *State v. Sartor*, 2 Strobb. 60, and *Merkle v. State*, 37 Ala. 139. In the first it was simply held that although an indictment for obstructing a highway was at common law, it was permissible for the State solicitor to refer to the public statutes, not to give character to the offense as against the statute, but to show what were public ways. 37 Alabama, 139, is based entirely on *Stoudenmeier v. Williamson*, 29 id. 566, in which the question considered was not whether an expert could read from medical works, but whether such books could themselves be introduced as evidence. In the opinion in the case last named the only English cases cited are *Collier v. Simpson*, *supra*, and *Attorney-General v. Glass Plate Company*, 1 Anstr. 39.

Of these the first is directly adverse to the proposition that a witness can be allowed to read from scientific treatises; the second — which holds that parol evidence is not admissible to explain the meaning of a word used in an act of Parliament — is admitted to have no bearing upon the question under consideration. It is further admitted by the learned Alabama judge that Greenleaf (vol. 1, § 440, note 5) is an authority against the admissibility of the evidence. Neither the Massachusetts nor Rhode Island cases are mentioned. The American decisions by him referred to are *Bowman v. Woods*, already commented on; *Luning v. State*, 1 Chand. 178, spoken of as "a very loose opinion," and *Green v. Cornwell*, 1 City Hall Rec. 14. In the last, which was a trial by jury in the Mayor's Court of New York city, a table from Blunt's Coast Pilot and Bowditch's Navigator was received to prove the condition of the tide at a certain time and place, the presiding judge saying, "the testimony is of equal validity with the Almanac." But clearly, *Stoudenmeier v. Williamson* is not authority to the point that a witness may fortify his opinion as expert by reading from books, since that question was not decided in that case. There an extract from a medical book was itself admitted in evidence, and as Mr. Bishop says, it is now well settled that the books themselves, or extracts from them, are not admissible as evidence.

If the last clause of the above citation from Bishop is to be construed as implying that counsel can read to a jury extracts from

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medical works and explain them, the great weight of authority is decidedly against so dangerous a license.

In *Merkle v. State*, *supra*, the book read from by the prosecuting attorney was first proved by the testimony of a practicing physician to be a book "recognized by the medical profession as good authority on all subjects therein treated of." The prosecuting attorney did not read from a book, not introduced in evidence nor proved to be authoritative, as was done in the case now before this court. In *Merkle v. State*, the Alabama court, solely on authority of *Stoudenmeier v. Williamson*, held that it was proper to receive such a book in evidence. This ruling is in conflict with the established law on the subject, as stated by Mr. Bishop himself. As to the other cases referred to in the note to the clause quoted from Bishop, some have been hereinbefore mentioned and commented upon, others have no relevancy to the immediate question. *McMath v. State*, 55 Ga. 303, only holds that under the supervision and subject to the correction of the court, counsel may read from books treating of the law of this country.

Our conclusion is that the court below erred in permitting the district attorney, in his closing argument to the jury, in the absence of any evidence that the work was of recognized authority in the medical profession, and against the objection of counsel for the defendant, to read from Browne's Medical Jurisprudence of Insanity "various sections treating of the subject of insanity, and sustaining the prosecution's theory of the case."

Judgment and order denying new trial reversed, and cause remanded for a new trial.

Judgment accordingly.

ROSS, J., concurred.

MCKEE, J., concurring: Books of science or art are *prima facie* evidence of facts of general notoriety and interest. But the court below erred in permitting the district attorney, against the objection of the defendant's counsel, to read to the jury extracts, "commenting upon the treating of the subject of insanity," from a book which was not proved to be a recognized or scientific work, or standard authority — was not offered in evidence in the case, nor made part of the testimony of any of the witnesses examined; and on that ground, I concur in the judgment of reversal.

CASES

OF THE

SUPREME COURT

OF

ILLINOIS.

ROTH V. ROTH.

(104 Ill. 35.)

Marriage — foreign divorce — conflict of laws.

A subject of the king of Würtemberg, while domiciled in Illinois, married there in accordance with the laws of that State. The marriage was however void, according to the laws of Würtemberg, because contracted without the license of the sovereign. The parties returning to that kingdom, and becoming domiciled there, at the suit of the husband the marriage was there decreed to be void. *Held*, that the decree deprived the wife of all rights, as widow or heir, in her deceased husband's estate in Illinois.

BILL by widow for partition. The head-note and opinion show the facts. The defendant had judgment below.

C. M. Harris, for appellant.

Rosenthal & Pence, for appellee.

MULKEY, J. In the view we take of this case we do not deem it necessary to follow counsel in the wide range their exhaustive and elaborate arguments have taken, but shall confine ourselves to

one or two of the topics discussed in the briefs, which we regard as conclusive of the controversy, whatever may be our views with respect to the other issues in the case.

So far as the marriage between Roth and Madelaine Moser is concerned, we have no hesitancy in saying that for all purposes, in this State, it was a legal and valid marriage, notwithstanding Roth, at the time, was a subject of the kingdom of Wurtemberg, and had not obtained a license authorizing such marriage from the sovereign of that kingdom, as required by the laws thereof. As both the parties were domiciled here at the time of its celebration, it is not important to determine whether the validity of a marriage depends upon the *lex domicilii* or the *lex loci contractus*, for whatever conclusion might be reached upon that question, the result would be the same, so far as this case is concerned. Both laws being identical, if the marriage was in conformity with either it must necessarily have been with the other also, and as it seems to have been solemnized in strict conformity with our statute regulating the subject, and as the parties were manifestly competent, under our own laws, to contract the relation, it follows, as before stated, the marriage was valid and binding.

While this marriage was clearly valid here for all purposes whatsoever, it does not follow that upon the return of the parties to the country of their nativity, and of which they were still subjects, it would or ought to be held equally valid there, for it is clearly settled by the decided weight of private international law, so called, that every State has the power to enact laws which will personally bind its citizens or subjects when sojourning in a foreign jurisdiction, provided such laws in terms profess to so bind them when thus circumstanced. It is true, such laws have no extra-territorial effect, so as to authorize their enforcement in a foreign country, and may therefore, so far as their execution is concerned, be said to remain dormant till the return of those violating them, when they will be enforced in the same manner, and to the same extent, as if their infraction had occurred within the State enacting them. Story Conf. Laws, §§ 114 d, 117, 244, 22; Whart. Conf. Laws, § 161; Lawrence's Wheaton, 172; 4 Phill. Int. Law, 29, § 34; Piggott For. Judg. 167, 168; Dicey Domicile, 215; 1 Burge Col. Law, 188, 195, 196; 1 Bish. Mar. & Div., § 368; *Sussex Peerage Case*, 11 Cl. & Fin. 85; *Brook v. Brook*, 9 H. L. Cases, 193; *Fenton v. Livingston*, 3 Macq. 497; *Mette v. Mette*, 1 Sw. & Tr. 416;

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Van Voorhis v. Brintnall, 86 N. Y. 18 ; s. c., 40 Am. Rep. 505 ; *Commonwealth v. Lane*, 113 Mass. 458 ; s. c., 18 Am. Rep. 509.

Nor does it follow the *status* or relation created by the marriage could only be annulled by our own courts, or that it could only be annulled by other courts for such causes as would be recognized as sufficient for that purpose under our own laws. When the parties returned to Würtemberg and acquired a new domicile there, so far as their personal rights and relations are concerned our laws and government ceased to have any power over them or concern with them. Personally the State had no claims on them, and they owed it no allegiance or duty. *Barber v. Root*, 10 Mass. 260 ; *Hunt v. Hunt*, 72 N. Y. 228 ; s. c., 28 Am. Rep. 129 ; *Kinnier v. Kinnier*, 45 N. Y. 535 ; s. c., 6 Am. Rep. 132 ; *Cheever v. Wilson*, 9 Wall. 108 ; *Ditson v. Ditson*, 4 R. I. 87 ; *Harvey v. Farnie*, L. R., 5 P. D. 153 ; same case affirmed, L. R., 6 P. D. 35 ; Story Conf. Laws, §§ 211, 213 ; 1 Bish. Mar. & Div., §§ 367, 368 ; Whart. Conf. Laws, § 211 ; Guthrie's Savigny on Private Int. Law, 248. Whether the kingdom of Würtemberg, on their return and acquiring a new domicile there, would recognize the *status* or relation which they had contracted here, depended upon its own laws, and not upon ours. That kingdom, in 1808, adopted an ordinance or law, which was in full force at the time of the marriage in Chicago, declaring all such marriages in a foreign State, without the license of the sovereign, absolutely null and void. It was therefore according to the general current of authority on the subject, entirely competent for the courts of that kingdom having jurisdiction of such matters, to give effect to that law by annulling and setting aside the marriage, upon a proper application for that purpose, which was done in this case. 1 Bish. Mar. & Div., §§ 367, 368 ; Story Conf. Laws, §§ 18, 19, 21-23, 25 ; Whart. Conf. Laws (2d ed.), § 207 ; 4 Phill. Int. Law, §§ 3, 11, 12, 13, 16, 24, 25 ; Guthrie's Savigny on Private Int. Law, 248.

Ordinarily where a party, upon a change of domicile, goes into another State or country, the personal *status* which he carries with him will be recognized by the courts of the latter country. This is certainly the general rule, but it is subject to certain well recognized exceptions. If for instance such *status* has been acquired, as in the present case, by a violation of an express provision of the positive law of the State in which its recognition is asked, or if it be contrary to the genius and spirit of its institutions, as a

title of nobility would be here, or if it is opposed to its settled policy, or to the good order and well being of society, or to public morality and decency, in all such cases the *status* would not and should not be recognized by the courts of the latter State. 2 Kent, *458; Whart. Conf. Laws (2d ed.), §§ 207, 165; Story Conf. Laws, §§ 98, 244; 4 Phillimore Int. Law (ed. 1861), p. 529; *Brook v. Brook*, 9 H. L. Cas. 193; *Cincinnati Mutual Health Ass. v. Rosenthal*, 55 Ill. 91; s. c., 8 Am. Rep. 626; *Forbes v. Cochran*, 2 B. & C. 448; *Mette v. Mette*, 1 Sw. & Tr. 416; *Commonwealth v. Lane*, 113 Mass. 458; s. c., 18 Am. Rep. 509; *Van Voorhis v. Brintnall*, 86 N. Y. 18; s. c., 40 Am. Rep. 505.

Assuming the compromises of appellant with Amalie and Roth respectively, relating to her interest in the latter's estate, were made by her in ignorance of her rights, and that they were effected through the fraud and misrepresentation of them, and others acting in concert with them, as is claimed by her, of which we express no opinion, at least for the present, it follows the result of this case must depend chiefly upon the legal effect which must, under the circumstances stated, be given by the courts of this State to the decree rendered by the Württemberg court annulling the marriage, and this we regard as the vital question in the case. The general rule unquestionably is, where it affirmatively appears the court of a foreign State has jurisdiction of the parties and subject matter of the suit, its judgment or decree will be conclusive on the parties, their legal representatives and privies, in all countries where the matters litigated are again drawn in question, and this is particularly true with respect to judgments or decrees affecting the *status* of a person, for they are in the nature of judgments *in rem*, which are binding on the whole world. Whart. Conf. Laws, §§ 800, 801, 802, 815, 816, 817, 822, 835; Bigelow Estop. 170, 178; Freeman Judgm., § 528; 2 Bish. Marr. and Div., § 755; Foote Private Int. Jur. 473, 474; Guthrie's Savigny on Private Int. Law, § 373, note c; *Harvey v. Farnie*, L. R., 5 P. D. 153; *Gould v. Crow*, 57 Mo. 200; *Rose v. Himely*, 4 Cr. 162; *Hobbs v. Henning*, 17 C. B. (N. S.) 821; *Dogliani v. Crispini*, L. R., 1 Eng. & Irish App. 301.

The above rule is also fully recognized by this court. *Baker v. Palmer*, 83 Ill. 568. The limitation to this rule is, that it may be shown that such judgment or decree was obtained by means of fraud, or some gross abuse of the process of the court, or flagrant

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departure from the ordinary course of judicial procedure, as for instance, that a party in interest sat as a judge in the cause. Foote on Private Int. Jur. 456, 472; 2 Story Eq. Jur., § 1582; Piggott For. Judgm. 116; Westlake Private Int. Law (last ed.), §§ 309, 310; *Crowley v. Isaacs*, 16 L. T. (N. S.) 529; *Ochsenbein v. Papelier*, L. R., 8 Ch. App. 695.

While it is claimed by counsel for appellant, in general terms, that the court rendering the decree in question acted without jurisdiction, and that the same was obtained by fraud, yet we fail to discover any thing in the record to warrant either of these charges. It is not sufficient, as it has often been held by this court, for the purpose of successfully assailing a transaction on the ground of fraud, to charge fraud generally; but the complaining party must state in his pleading, and prove on the trial, the specific acts or facts relied on as establishing fraud. That has not been done in this case. So far as we are able to discover, the trial was perfectly regular, and conducted with the utmost fairness, and we see no ground to question the jurisdiction of the court. The depositions of persons learned in the law of that country have been taken in this cause, and they clearly show the several courts through which that case passed during its pendency, were by the laws of that country the proper tribunals to take cognizance of cases of that character in the manner it was done. And it is further shown that both parties appeared in the cause, by themselves and counsel. Hence, as before stated, we see no ground for questioning the jurisdiction of those tribunals. We are of opinion therefore the decree of nullity must be given in the courts here the same effect which would be given to it by the courts of the country in which it was rendered. The effect of the decree there, as we understand it, was not merely to establish conclusively the nullity of the contract of marriage, or of the marriage itself, but also to annul and terminate the *status* or marital relation of the parties which arises from a *de facto* as well as a *de jure* marriage, so as to leave them in precisely the same condition as if no marriage had ever taken place between them. This being the effect of the decree there, it must be given the same effect here. *Barber v. Root*, 10 Mass. 260; *Ross v. Ross*, 129 id. 243; *Kinnier v. Kinnier*, 45 N. Y. 535; s. c., 6 Am. Rep. 132; *Hunt v. Hunt*, 72 N. Y. 228; s. c., 28 Am. Rep. 129; *Harvey v. Farnie*, L. R., 5 P. D. 153; *Roach v. Garan*, 1 Ves. Sr. 159; *Collington's case*, 2 Swanst. 326, note; 2 Kent Com. *107; 2

Bish. Marr. and Div. § 754 ; 1 id., §§ 354, note, 355 ; Whart. Confl. Laws (2 ed.), §§ 1-3, 213, 671 ; Story Confl. Laws, §§ 37, 595, 597 ; 4 Phill. on Int. Law (new ed.), §§ 836, 839 ; Freem. Judgm., § 579 ; Foote on Private Int. Jur. 473, 474.

Such then being the legal operation of the decree, it follows that the appellant was not at the time of Roth's death his wife, either *de facto* or *de jure*, and hence she is not his widow, for no one answers that description who was not his wife at the time of his death, and consequently she has no right, as such, to succeed to his estate. *Hood v. Hood*, 110 Mass. 463. For the same reasons it follows that the subsequent marriage between Roth and Amalie was lawful and valid, and that relation having continued up to the time of his death, it results that she, and not appellant, is his lawful widow and as such is entitled to his estate. It is true the "marriage and inheritance contract" did not, upon his decease, have the effect of clothing her with legal title to the real estate in controversy, as his survivor, as it doubtless would have done had the property been situated in the kingdom of Würtemberg instead of here ; for it is not competent for parties, here or elsewhere, by mere agreement, to change the manner of transferring real property in this State, but the agreement in question, upon his decease, operated as an equitable assignment of the estate to her, which was properly enforced by the decree in this case. Story Confl. Laws, §§ 143, 159, 184 ; Westlake Private Int. Law (new ed.), §§ 34, 35, 205 ; id. (old ed.), §§ 99, 371 ; *Decouche v. Savetier*, 3 Johns. Ch. 199 ; 8 Am. Dec. 478 ; *Besse v. Pellochoux*, 73 Ill. 285.

Having reached the conclusion stated with respect to the decree of nullity, it is therefore unnecessary to discuss the effect of the compromise above alluded to, and relied upon as an estoppel by appellee. Whatever our views might be with respect to that matter, we are of opinion the law is with the appellee, on the grounds already stated.

Decree affirmed.

SCOTT and WALKER, JJ., dissenting.

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(104 ILL. 100.)

Criminal law — appeal of escaped convict.

The court will not hear the appeal of an escaped and convicted prisoner, not on bail. (See note, p. 88.)

CONVICTION of burglary. The opinion states the point.

James McCartney, attorney-general, and *L. W. Brewer*, State's attorney, for people.

SCOTT, C. J. The plaintiffs in error are in no position to invoke the judgment of this court in respect to the errors alleged to have been committed on their trial and conviction in the court below. They do not stand ready to abide that judgment when pronounced, but since suing out the writ they have broken jail, and fled from the custody of the officer, and are standing in defiance of the law and its officers. It is a matter within the discretion of the court whether we will hear the writ under these circumstances. The better practice clearly is, that the cause shall not proceed to a hearing when the persons to be affected are not within the jurisdiction of the court to answer to its judgment, but are in the attitude of fugitives from justice. While it is not essential to the validity or binding force of any judgment which may be rendered by this court upon exceptions presented by one who has been convicted upon a criminal charge, that he should be present in court, either at the hearing of the cause or upon the rendering of the judgment, yet it would be idle for the court to proceed to determine the questions presented, when the possibility of enforcing whatever judgment it might pronounce must depend upon the option of the fugitives to return into custody, or upon the remote chances of their ultimate recapture by the officers of the law. Before the powers of the court can appropriately be called into action in a criminal procedure like this, the person to be affected by the judgment ought to be within the control of the court below, either actually, by being in custody, or constructively, by being on bail. The reason of the rule is obvious. Should a hearing of the cause result in an

affirmance of the judgment below, the escaped prisoners would not be likely to return voluntarily to meet the execution of the sentence. Should a reversal result, they might return and submit to another trial or not, as the grounds of the decision might suggest to them the prudence of one or the other course of action. We do not think it would subserve the ends of justice to permit persons charged with crime to speculate in this manner upon their chances of escape or conviction. Persons appealing to this court for redress should stand in an attitude to accept and abide the result, whatever that may be. The authorities upon the question are in harmony with the reason of the rule, as will appear by an examination of the cases cited by counsel.

We will not dismiss the writ of error at this time, but if the plaintiffs in error shall not return and submit themselves to the custody of the law, or in some other way be brought within the control of the proper officer, by the first day of the next term of this court, then the writ of error will be dismissed.

Rule nisi.

NOTE BY THE REPORTER.—To the same effect, *People v. Redinger*, 55 Cal. 280; s. c., 38 Am. Rep. 38; *State v. Wright*, 28 La. Ann. 1017; s. c., 36 Am. Rep. 274; *State v. Conners*, 20 W. Va. 1. In the latter case the court said: "The provisions of the statutes giving to defendants in criminal cases the right to make a bill of exceptions are not so absolute as to displace all the other principles, which belong to criminal proceedings, but must be taken in subordination to them. We think they do not require the courts to encourage escapes and facilitate the evasion of the justice of the State by extending to escaped convicts the means of reviewing their convictions."

"In *State v. Rippon*, 2 Bay. 90, the Supreme Court of South Carolina held substantially that whenever corporal punishment was either probable or certain, the defendant should be in the presence of the court, before they proceeded to hear a motion for a new trial; and the court refused to hear an argument on the motion, but directed that a bench warrant be issued against the defendant upon his conviction, in order to have him apprehended and brought to final justice.

"In *Rex v. Teal*, 11 East, 307, the syllabus is: 'All the defendants convicted upon an indictment for a conspiracy must be present in court before a motion for a new trial is made on behalf of any of them.'

"In the case of *Commonwealth v. Andrews*, 97 Mass. 542, the syllabus is: 'A defendant in a criminal case, in which exceptions are pending, who broke jail and does not appear in person on demand by the attorney-general to receive judgment on the exceptions, waives all right to be heard therein by counsel.' In this case the indictment was for receiving stolen property. At the trial in the Superior Court the defendant was found guilty and alleged exceptions, which were allowed and which he was held in jail to prosecute. The case being called in the Supreme Court of Massachusetts, the attorney-general suggested that the defendant had broken jail and was at large, and asked that he should be defaulted and the exceptions overruled without argument; and BICKLOW, C.J., in delivering the opinion of the court, said: 'The defendant by escaping from jail, when he was held for the purpose of prosecuting these exceptions and abiding the judgment of the court therein, has voluntarily withdrawn himself from the jurisdiction of the court. He is not present in person nor can he be heard by attorney. A hearing would avail nothing. If a new trial should be granted he is not here to answer further; if the exceptions are overruled a sentence cannot be pronounced and executed upon him. The attorney-general has a right to ask that he

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should be present to receive the judgment of the court. 1 Chitt. Crim. Law, 688; *Reg. v. Cauldwell*, 17 Q. B. 508. So far as the defendant had any right to be heard under the Constitution, he must be deemed to have waived it by escaping from custody and failing to appear and prosecute his exceptions in person according to the order of court, under which he was committed.'

"In the case of *Sherman v. Commonwealth*, 14 Gratt. 677, the syllabus is as follows: 'A prisoner convicted of felony obtains a writ of error, which is directed to operate as a *supersedeas*, and he then escapes from jail. The Appellate Court will discharge so much of the order awarding the writ of error as directed it to operate as a *supersedeas* to the judgment, and will further direct that the writ of error be dismissed by a certain day unless it shall be made to appear to the court by that day, that the plaintiff in error is in custody of the proper officers of the law.' In this case John W. Sherman was indicted, tried and convicted in the Circuit Court of Culpepper county for a felony in advising a slave to abscond from his master, and he was sentenced to six years' imprisonment. From this judgment he obtained a writ of error from the Court of Appeals, which was directed to operate as a *supersedeas* to the judgment. Whilst the case was pending in the Court of Appeals the prisoner broke jail and absconded. The attorney-general then moved the court for a rule upon the prisoner to show cause why the court should not set aside the *supersedeas* or postpone the hearing of the case, until the prisoner should return to the proper custody. Judge ALLEN delivered the opinion of the court upon the motion, which is as follows: 'The argument as well of the attorney-general in support of said rule, as of the counsel who appeared for the plaintiff in error in opposition thereto, having been maturely considered, and it appearing that said plaintiff in error has since the judgment of conviction escaped from custody and is still at large, it is considered by the court that so much of the order awarding the writ of error in this case, as directed it to operate as a *supersedeas* to the judgment of conviction in the petition set forth, be discharged; and it is further ordered that said writ of error be dismissed on the first day of May next, unless it shall be made to appear to this court on or before the day last aforesaid that said plaintiff in error is in custody of the proper officer of the law. Ordered, that a copy of this order be certified to the Circuit Court of Culpepper county.'

"In the case of *Leftwich v. Commonwealth*, 20 Gratt. 716, the fourth section of the syllabus is as follows: 'The Court of Appeals will not hear a case where the prisoner has escaped and is going at large, but will make an order to dismiss the appeal, unless he returns into custody. But having heard and reviewed a case without having been informed of the escape of the prisoner, the court will not afterward set it aside.' In this case the court, at page 723, says: 'And although the court, if informed of these facts before hearing and deciding this case, would have pursued the same course which was pursued by the court in *Sherman v. Commonwealth*, 14 Gratt. 677, and in *Haze v. Commonwealth*, in 1867 (not reported); that is, would not have decided or heard the case, while the plaintiff in error was going at large, but would have made an order, that the said writ of error should be dismissed on a certain day unless it should be made to appear to this court on or before that day that the said plaintiff in error was in custody of the proper officer of the law; yet as the case was heard and decided without such information, the court deems it proper not to set aside the judgment entered in this case on yesterday, but to permit the same to stand and remain in full force,' etc.

"From what has preceded it is manifest that there is a material difference in the practice of the courts upon motions similar to the one made in this case, and now under consideration, upon the facts appearing in support of the motion. According to the practice in Kentucky, as shown by the case before cited in 10 Bush, 526, and perhaps some other cases, which I have cited, we would be justified in sustaining the motion and now dismissing the writ of error allowed in the case at bar because of the plaintiff in error having, since the writ of error was allowed in this case, broken jail and escaped from custody, and being now at large by reason of such escape. But the practice of Virginia, before this State became one of the States of the Union, in such cases, and since as shown by the cases above cited in 14 Gratt. 677, and 20 Id. 716, is different and less harsh and perhaps less arbitrary. It seems to me, that this court should under the circumstances follow the established Virginia practice, as far as may be under the circumstances, unless some good reason is shown why it should not be followed; and no such reason has been brought to our attention as yet, so far as I am able to perceive.

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"This practice gives the plaintiff in error further time yet to have the judgment of the court below reviewed by this court and any material error therein to his prejudice corrected, if any such error exists upon the writ of error pending in this case, if he complies with the order of this court within the time prescribed. Upon the whole it seems to me that we should not at this time absolutely dismiss the writ of error allowed in this case; but that this court should now make and enter upon said motion an order in substance as follows: The argument as well of the attorney for the State in support of his motion made at a former day of the present term of this court to dismiss the writ of error allowed in this case for the reasons in said motion stated of record, as of the counsel, who appeared for the plaintiff in error in opposition thereto, having been maturely considered, and it appearing, that said plaintiff in error has since the judgment of conviction escaped from custody and is still at large, it is ordered that said writ of error be dismissed on the 7th day of June, 1883, unless it shall be made to appear to this court, during its present term or at any subsequent term thereof, which may be held at either of the places prescribed by law for the holding of the sessions of this court, on or before the day last aforesaid, that the said plaintiff in error is in custody of the proper officer of the law."

VILLAGE OF BROOKLYN V. SMITH.

(104 Ill. 429.)

Boundary — street on navigable stream.

A street bounded on a navigable stream, above high-water marks, extends to the center of the stream, in the absence of evidence of a contrary intention, and the adjacent lot-owners are entitled to the ice formed on that portion of the stream.*

BILL for injunction to restrain village authorities from preventing the plaintiff's taking ice. The head-note and opinion show the point. The plaintiff had judgment below.

Wm. P. Launtz and M. Millard, for appellant.

R. F. Wingate, for appellee.

SHELDON, J. The principal inquiry which arises in this case, as we view it, is as to the extent of Water street, in the town of Brooklyn, as it was originally laid out and platted — whether the western boundary of that street was the Mississippi river, or a straight north and south line, distant eighty feet west from the front and west tier of blocks in the town. The complainant contends that the

* See *Wood v. Fowler* (36 Kans. 682), 40 Am. Rep. 830.

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latter is the western boundary line of the street, and that this is conclusively determined to be so from the statement on the plat of eighty feet as the width of the street.

Under the circumstances appearing in this case, we cannot regard this mention on the plat of the width of the street as fixing the western boundary of Water street to be a line eighty feet west from the western line of the town lots. Here is a town laid out upon the bank of a navigable river, with Water street in front of the town, between it and the river, and the idea of the street not extending to the river seems preposterous. Of what use to the proprietors would be the reservation to them of any thing between the street and the river, and what a lessening of the value of a town site upon a navigable stream would be the absence of a public landing? It must be supposed that such a town is laid out with reference to the use and enjoyment of the river. A public landing would be viewed as a thing of prime interest, which would be an element of value pertaining to every town lot which was to be sold. As was said by this court in a similar case, *Godfrey v. City of Alton*, 12 Ill. 29: "This stream is a public highway. In contact with this another easement is granted, and the very location of it shows it was designed for the purpose of lading and unlading freight and landing passengers from the water communication, as much as the laying out of an interior street would show it was designed for the use of travellers by land." The western line of Water street, as marked upon the original plat, is not a straight line, but an irregular, wavy line, denoting, as we take it, the meandering of the river, and thus indicating the river to be the boundary. The express reservation on the plat of the exclusive right to all ferry privileges, indicates the understanding of the proprietors that Water street extended to the river. We had the express testimony of the civil engineer who laid out the town under the supervision of two of the proprietors, who visited the ground with him and designated the work to be done, that Water street extended from the front of the town to the bank of the river, and followed the course of the river from north to south—that all the land west, extending westwardly from the front of the blocks fronting towards the river was considered Water street, whatever that might be. We can have no doubt, from all that appears in the case, that the western boundary of Water street was the Mississippi river. All the meaning that we can ascribe to the designation of eighty feet as

the width of the street is that that was about the average width of the space between the front tier of blocks and the river.

A point is made upon the subsequent plat made by Ludwig in 1873, upon the incorporation of the village, its adoption and being placed on record by the board of trustees, as estopping the village from claiming Water street to be any greater in extent than it appears to be as marked on that plat. It was the original plat, and the original proprietors that made the dedication. The board of trustees or Ludwig had no power to make any dedication, or to subtract from the original dedication. There was no authority of law for the making or recording of this plat of Ludwig. Ludwig was employed only to make a re-survey of the old town. If he misconceived the extent of Water street, and made it to appear less than it in truth was, he would have failed to make an accurate re-survey; but that would not matter—it would be the original survey and dedication which would prevail. We cannot see in all this any elements for the founding of an estoppel against the village from claiming Water street in its integrity as originally laid out. The fee of the street, as thus laid out, is held by the corporation for the benefit of the lot owners and the public.

The legislative vacation of the original plat in 1845 is insisted upon as an annulment of that plat. This might well be had there been no sale of lots; but at that time many, if not all the lots, had been sold. The right to the use and enjoyment of this Water street for a street and public landing, appertained to these lots as a valuable privilege, and the legislature did not undertake to do the unjust thing of destroying such rights; but the act of vacation contained the express proviso that the act should not interfere with or prejudice the rights of any individual or individuals who might have become the purchaser of any lot or lots in the town. The evidence perhaps does not show distinctly that all of the lots had then been sold, but it warrants the conclusion that a large number, if not all, had been sold. The interests of these lot owners, by its express terms, are unaffected by the act, and it is through this village corporation that they may be protected and asserted. The legal title to the streets is vested in the corporation, for the use and benefit of the lot owners and the public. It does not matter that the town had no corporate existence at the time the act was passed. If the town has not a corporate existence, the fee in the streets remains in abeyance, subject to vest in the corporation the moment

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it is created. *Canal Trustees v. Haven*, 11 Ill. 554; *Gebhardt v. Reeves*, 75 id. 301. We must regard this vacating act as inoperative upon any rights here involved.

Finding, as we do, the boundary of Water street to be on the Mississippi river, the street extended to the center of the river. Grants of land bounded on rivers or upon their margins, above tide-water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge of the river. *Braxton v. Bressler*, 64 Ill. 488, and authorities there cited. The premises in question then were in Water street of the village of Brooklyn.

It appears from the evidence that Water street was ever regarded by the inhabitants of the village as extending to the river, and so used, with no pretense ever made of any private claim to the contrary, until in 1873, when Mrs. Purdy went upon the river front and fenced a portion of it, claiming title, as her husband says, under deeds from the heirs of Osborn. No deeds were shown in evidence. But supposing there had been shown deeds from Osborn's heirs, they would have conveyed but Osborn's interest, which at most could have been only a one-fifth interest, as one of the five original proprietors. But Osborn left no interest to descend and be conveyed. The acknowledgment by him and recording of the original plat had all the force of an express grant to convey from him the land embraced by Water street, and vest it in the corporation of the village. *Canal Trustees v. Haven, supra*. The corporation was the owner in fee of the streets. In *Washington Ice Co. v. Shortall*, 101 Ill. 46, we held, ice formed upon a stream of water to belong to the owner of the bed of the stream.

The case presented seems to be that of an intruder upon the public street of a village seeking an injunction against the village authorities to prevent their interference with his operations in cutting and removing ice from the street — that is, a trespasser asking against the legal owner freedom from interruption in the despoilment of the latter's property. We perceive no right in the complainant which may lay claim to the interposition of a court of equity for its protection.

The decree will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

MULKEY, J., dissenting.

GLANZ V. GLOECKLER.

(104 ILL. 572.)

Insurance — life — ownership.

Where a father insured his life for the benefit of his infant daughter, himself paying the premiums and retaining the policy, the policy running to the daughter, her executor, etc., held, that on her death the legal representative of the daughter was entitled to possession of the policy. (*See note, p. 96.*)

ACTION for possession of a life insurance policy. The opinion states the case. The plaintiff had judgment below.

Jussen & Anderson, for appellant.

Frank J. Smith, for appellee.

MULKEY, J. This was a proceeding by petition, commenced originally in the Probate Court of Cook county, by Charles S. Gloeckler, the appellee, as administrator of Amelia L. Gloeckler, his deceased wife, against Louis Glanz, the appellant, and father of the said Amelia L. Gloeckler, to recover the possession of a policy of insurance issued by the United States Life Insurance Company of New York city, upon the life of appellant, for the sum of \$5,000. to be paid upon his death to the said Amelia L. On the hearing of the cause, the Probate Court entered an order directing the surrender of the policy, in conformity with the prayer of the petition. From this order Glanz appealed to the Circuit Court of Cook county, where the cause was heard *de novo*, and a similar conclusion reached. Appellant thereupon prosecuted an appeal to the Appellate Court for the first district, where the judgment and order of the Circuit Court were affirmed, and he now brings the case here for review, and the cause is submitted upon the following agreed state of facts :

“ December 10, 1860, the United States Life Insurance Company of New York city, in the State of New York, made, issued and delivered in said city its policy of insurance numbered 8503, which declared, among other things, that in consideration of \$122.35 to said company in hand paid by Amelia L. Glanz, and of the annual premium of \$122.35, to be paid in advance on or before December

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10 in every year during the continuance of said policy, said company did insure the life of said Louis Glanz in the amount of \$5,000, for the term of his natural life; and that said company did thereby promise and agree to and with the said assured, her executors, administrators and assigns, well and truly to pay, or cause to be paid, the said sum assured to the said assured, her executors, administrators or assigns, within three months after due notice and proof of the death of said Louis Glanz: *Provided*, that if said Louis Glanz should, without the consent of the said company previously obtained and entered upon said policy, pass beyond the settled limits of the United States, * * * then said policy should be void, and that said policy should also be void in case any representation in the application for said policy should be found to be untrue. Permissions to said Louis Glanz to visit or reside in Europe are indorsed upon said policy under date of March 1, 1861, March 7, 1862, March 20, 1866, and March 17, 1867. Said policy was issued on the application of respondent, Louis Glanz, in the year A. D. 1860, and when the said Amelia L. (or Emily L.) was only six years of age. All premiums have been paid by the respondent, and out of his own moneys, up to the death of the decedent. The decedent and beneficiary in said policy was the daughter of this respondent, and the only daughter and child of respondent at the date of the issue of said policy; that decedent died August 22, 1879, at the age of twenty-five years, and left her surviving no child or children, or descendants of child or children; that decedent never paid any thing to the respondent for or on account of said policy, but was his daughter, and resided with him until her marriage, in June, 1879, nor has he, the respondent, ever made any charge against her or her estate for or on account of said premiums; that respondent has had possession of said policy since its issue, and the permissions thereon for respondent to visit Europe were granted by the company at respondent's sole request; that said policy was made and issued in the city of New York, in the State of New York, and there delivered; that said policy has a surrender value of over \$1,000; that the respondent, on the 9th day of October, 1879, served upon the company issuing said policy a written notice, notifying said company of respondent's purpose and desire to change the beneficiaries in said policy."

It is clear, from an examination of the policy, the sum insured upon appellant's life is, in express terms, made payable, upon his

decease, to his daughter, appellee's intestate, and had she survived him, it will not be questioned that she alone could have maintained an action on the policy; or in other words it must be conceded, the contract, of which the policy is the only evidence, was between the company on one side, and Amelia L. Glanz on the other, and the company expressly covenants with her, "her executors, administrators and assigns," and upon her decease it is clear the legal title in the contract vested in appellee, as her legal representative. This being so, we are aware of no principle that would authorize appellant to arbitrarily, and without the consent of appellee, defeat this vested right in him. Nor is his right in this respect at all affected by the fact that the contract of insurance was entered into by the company on the application of the appellant upon his own life, or that the premiums were paid to the company out of his own funds. The contract having been expressly made with, and for the benefit of appellee's intestate, as we have already seen, it follows appellee is legally entitled to the possession of the policy, and as the judgment of the Circuit Court was in conformity with this view of the law, it follows the Appellate Court committed no error in affirming it. Had appellant, when causing this policy to be executed to his daughter, desired to retain control over it in the event of her death without issue, it would have been very easy to have provided for such a contingency; but nothing of this kind was done, or even attempted to be done, and he must abide the consequences.

The view we have taken of the case seems to be fully sustained by the authorities. *Eadie v. Slimmon*, 26 N. Y. 9; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157; *Swan v. Snow*, 11 Allen, 224; *North American Life Ins. Co. v. Wilson*, 111 Mass. 542; *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60; *Hutson v. Merrifield*, 51 Ind. 24.

A number of cases have been cited by appellant which are supposed to lay down a different rule in cases of this character. Without entering upon any analysis or review of those cases, suffice it to say, that upon a careful consideration of them, we are of opinion they are all distinguishable from the case before us, and may readily be reconciled with the view we have taken of it.

The judgment will be affirmed.

Judgment affirmed.

SCOTT, C. J., and WALKER, J., dissenting.

NOTE BY THE REPORTER.—To the same effect, *Re Richardson*, 47 L. T. Rep. (N. S.) 514, citing *Fortescue v. Barnett*, 3 M. & K. 36; *Sewell v. King*, 14 Ch. Div. 170. Also *Brockham*

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v. *Kenna*, 7 Fed. Rep. 608, citing *Clark v. Durand*, 12 Wis. 223; *Kerman v. Howard*, 28 id. 186; *Charter Oak Ins. Co. v. Brant*, 47 Mo. 419; 4 Am. Rep. 326; *Landrum v. Knowles*, 22 N. J. Eq. 594. See also *Bicker v. Charter Oak Ins. Co.*, 27 Minn. 196; a. c., 38 Am. Rep. 268, and note, 262.

BARTHOLOMEW V. PEOPLE.

(104 Ill. 601.)

Witness — infamy — statutory construction.

A statute enacted that no person should be disqualified as a witness by reason of criminal conviction, but the conviction might be shown to affect his credibility, and that any defendant in a criminal case might at his option be a competent witness. The statute also specified certain crimes, conviction of which rendered the party infamous. *Held*, that to impeach a defendant in a criminal case for infamy, the judgment of the former conviction must be shown, and mere evidence that he has been a convict in a State prison is inadequate.

CONVICTION of larceny. The opinion states the case.

Barge, Rathbun & Barge, for plaintiff in error.

Jas. McCartney, attorney-general, and *C. B. Morrison*, for people.

SCHOLFIELD, J. Plaintiff in error was convicted, by the judgment of the court below, of the crime of larceny.

[Omitting a minor point.]

The defendant was himself examined as a witness, and his testimony tended to make out this defense. Upon cross-examination he was asked if he had not been in the penitentiary. The same question was repeated to him several times, under different forms. He uniformly answered in the negative. Afterward the prosecution introduced Moses H. Luke, receiving and discharging clerk of the penitentiary, located at Joliet, whom the court permitted to testify, over the defendant's objection, that he had seen the defendant in the penitentiary at Joliet, suffering punishment as a convict under two different judgments of conviction. The same witness was also allowed to produce and read to the jury, over the defendant's objection, the *mittimus*es under which, he testified, the defendant

had been, each time, received into the penitentiary as a convict. The same witness was also allowed to produce and read to the jury, over the defendant's objection, a statement made by the officers in charge of the penitentiary, as, the witness said, when the defendant was each time received into the penitentiary. This gives the date received, the number by which registered, the name, the *alias*, the county where from and the crime for which sent, term of imprisonment, age, personal description, etc. Exception was taken to these rulings at the time.

Under the common law, persons convicted of crimes which rendered them infamous were excluded from being witnesses. 1 Whart. Crim. Law (7th ed.), § 758 ; 3 Bl. Com. (Sharswood's ed.) 369, 370 ; 1 Greenl. Ev., § 372. All crimes were not deemed infamous (1 Roscoe Crim. Ev. [5th Am. ed.] 134 ; 1 Greenl. Ev., § 373), and it was the infamy of the crime, and not the nature or mode of the punishment, that rendered the witness incompetent. Our statute provides : " Every person convicted of the crime of murder, rape, kidnapping, willful and corrupt perjury or subornation of perjury, arson, burglary, robbery, sodomy or other crime against nature, incest, larceny, forgery, counterfeiting, or bigamy, shall be deemed infamous." Rev. Stat. 1874, 394, § 279. This leaves several offenses punishable by confinement in the penitentiary that were neither deemed infamous at common law nor are declared to be so by statute, notably among which may be mentioned manslaughter, — an offense which is clearly not inconsistent with entire veracity.

By section 6 of division 42, of the revised Criminal Code, Rev. Stat. 1874, page 410, it is enacted : " No person shall be disqualified as a witness in a criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility : Provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness." Palpably, the purpose of this section is simply to remove the common-law disability, and allow witnesses to testify who were thereby excluded. It neither professes to, nor does by implication, enlarge the class of cases wherein convictions discredit the witness. At common law, conviction of an infamous offense excluded the party from being a witness, but now he may testify notwithstanding such conviction, — *i. e.*, of an infamous offense ; but the fact of

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such conviction — *i. e.*, of an infamous offense, — may be shown for the purpose of affecting his credibility. It could not have been designed to have allowed proof of a conviction for an offense, not legally presumed to affect his credibility, to be given in evidence. It is to be noted it is the conviction, not the punishment, for the offense, that may be shown, for the purpose of affecting credibility — and this was the proof required at common law to exclude the witness. “It is,” says Greenleaf’s Evidence, § 375, “the judgment, and that only, which is received as the legal and conclusive evidence of the party’s guilt, for the purpose of rendering him incompetent to testify. * * * And the judgment itself, when offered against his admissibility, can be proved only by the record, or in proper cases, by an authenticated copy, which the objector must offer and produce at the time when the witness is about to be sworn, or at farthest in the course of the trial.” Roscoe, in his work on Criminal Evidence (5th Am. ed.), 136, says: “Where it was said that a witness is disqualified by conviction, a judgment of a court of competent jurisdiction was meant, and that judgment must have been proved in the ordinary way.” Further along the author says: “It must have appeared that the party was convicted before a competent tribunal. Thus where, in order to prove a conviction at Sierra Leone, an indictment and conviction thereupon were given in evidence, BAILLY, J., held it insufficient, because it did not show by what authority the indictment was found, and because it was imperfect, as a record, without the caption” — citing *Cooke v. Maxwell*, 2 Stark. N. P. 183; and the case fully sustains the text. To the like effect is 1 Whart. Crim. Law (7th ed.), §§ 763, 659.

That at least the caption, returning of the indictment into open court by the grand jury, the indictment and arraignment of the defendant, are as indispensable parts of the record as the judgment of conviction, can admit of no doubt. 1 Bish. Crim. Proc. 913, *et seq.* The statute only requires a certified copy of the judgment — not a copy of the record of conviction — to be delivered to the sheriff or other proper officer of the county, as his authority for taking a convict and delivering him to the warden of the penitentiary. Rev. Stat. 1874, p. 414, § 18, div. 45, of the Criminal Code. This is not made evidence of the conviction of the defendant generally, but is simply designed as a protection to the officers receiving the party, and detaining him and as to them, and for that act, is

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doubtless sufficient evidence of his conviction. But they who undertake to discredit a party because of his conviction of an infamous crime must make legal proof of that fact — not merely of authority to detain in the penitentiary; and in our opinion no such proof was here made.

There was as we conceive no reason why the prison record, or a copy of it, should have been read in evidence. Plaintiff in error by electing to become a witness, placed himself, so far as cross-examination was concerned, on the same plane with other witnesses. The jury were authorized to take his interest in the result of the case into consideration, and they were at liberty to wholly disregard his evidence, if from other evidence they believed it untrue; but they were also at liberty to give credence to it, and might if they believed it to be true, act upon it, even to the extent of his acquittal. It was as essential to the theory of the law admitting plaintiff in error to testify, that his evidence should not be improperly impeached or discredited, as that the evidence of any other witness should not be thus discredited. It is quite true the jury might not have decided differently from what they did if this evidence had been excluded; but they might have done so and plaintiff in error was entitled to the benefit of that chance. We cannot say the jury were bound to disbelieve the evidence of the plaintiff in error, nor can we say that if his evidence had been believed, the same result, both as to fact of guilt and amount of punishment, must have been reached, and plaintiff in error was entitled to all evidence that might legitimately have affected him in either respect.

We perceive no other error in the record, but for that indicated the judgment is reversed and the cause remanded.

Judgment reversed.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

ALLEN'S APPEAL.

(30 Penn. St. 196.)

Marriage — fraud in — concealed pregnancy.

Where a woman contracts marriage while pregnant by another than her husband, and conceals her pregnancy, it is for a jury to determine whether this is such fraud as avoids the marriage.* (See note, p. 104.)

ACTION for divorce. The facts are sufficiently shown in the last paragraph of the opinion. The plaintiff had judgment below.

T. B. Seabright, and Edward Campbell, for appellant.

Boyle & Mestrezat, and W. H. Playford, for appellee.

SHARSWOOD, C. J. By the first section of the act of May 8, 1854, Pamph. L. 644, it is provided that "it shall be lawful for the courts of Common Pleas of this Commonwealth to grant divorce where the alleged marriage was procured by fraud, force or

coercion." By this language must of course be understood such fraud as would at common law render a marriage void. It is settled beyond all controversy, that fraud which would vitiate any other contract—even an executory contract to marry—will not have that effect when the marriage has actually been solemnized and consummated. "It is well understood," says Chancellor Kent, "that error and even disingenuous representation, in respect to the qualities of one of the contracting parties in his condition, rank, fortune, manners and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced." 2 Kent Com. 77. It assumes that the party in entering into so solemn a contract—involving the most important duties and responsibilities for life, and upon which his happiness so much depends—has made all proper inquiries or is willing to take the other party upon trust without inquiry. According to the form of the marriage service of the church of England, each party takes the other "for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish till death them do part according to God's holy ordinance." The fraud must be in what has been sometimes termed the *essentialia* of the contract. False personation by one of another person would undoubtedly be such a case. As to any other it will be found difficult, after looking through all the authorities, to lay down any rule which can sharply define and distinguish what are and what are not essentials. Every case must to some extent depend on its own circumstances. Thus it is well settled that want of chastity on the part of the woman—ante-nuptial incontinence—even though she may have expressly represented herself as virtuous—forms no ground for avoiding the contract. Mr. Bishop, who has studied the subject with great care and research, in his valuable treatise on Marriage and Divorce, § 179, considers that on well-established principles, if the woman has even been a common prostitute, and has reformed her life, yet conceals her former misconduct, the marriage would still be good. The marriage contract is an express renunciation by her of all unlawful intercourse with others than her husband; and he makes a similar renunciation. According to the marriage service before referred to they both solemnly promise, "forsaking all others," to keep themselves solely to each other. I consider this marriage service as good evidence of the ancient common law of England. This seems to be also the dictate of human-

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ity and in conformity to the gospel which so strongly throughout inculcates the rule of mutual forgiveness. For otherwise one of strong passions, led astray by them or seduced by the wicked arts of others, could have no hopes from reform. In such cases it is best for society that the past should be entirely buried in oblivion and that the poor, erring creature should have the chance of a new life of respectability and honor. It is best that the other party should know, when the sin is afterward revealed to him, that it can do no good, but unmixed evil, to make it public by applying for a divorce. They must learn to submit to the inevitable. In this country — certainly in this State — adultery is a ground for divorce *a vinculo matrimonii*; so that if there should be a relapse after marriage, the marriage can be annulled. The only practical result therefore of declaring the marriage absolutely void, *ab initio*, for simple ante-nuptial incontinence — whether in one instance or many — would be to render innocent children illegitimate. And if ante-nuptial incontinence be a sufficient ground of nullity as against the woman, it is not easy to see why it should not be so likewise against the man, and the consequences of such a doctrine it is not difficult to predict.

Actual pregnancy at the time of marriage presents an entirely different question. It introduces a different element. The marriage status of the parties is changed. The man is then necessarily put to the alternative of publishing his wife's shame or submitting to have the child of a stranger, an alien to his blood, introduced, recognized and educated as his own legitimate offspring. If a man indeed marries a woman knowing her to be pregnant, even though he may believe that he is the father, he cannot set up the fraud, if afterward discovered; for no man would do such a thing unless conscious of having had himself previous connection with her; and though she may have falsely assured him that the child was his, if he chooses to rely on that assurance he must bear it as a misfortune. In one very strong case, where the parties being white, the child born after marriage proved to be a mulatto, yet the woman simply concealed from the man the fact of having received a negro's embraces about the time she did his, the marriage was adjudged valid. *Scroggins v. Scroggins*, 3 Dev. 535. In support of these general views it will be sufficient to refer besides to *Reynolds v. Reynolds*, 3 Allen, 605; *Leavitt v. Leavitt*, 13 Mich. 452; *Helden v. Helden*, 6 C. E. Green, 61; *Faw v. Faw*, 2 McArth. 35;

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Foss v. Foss, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330; *Baker v. Baker*, 13 Cal. 87; and our own case of *Hoffman v. Hoffman*, 6 Casey, 417. "There is no absolute rule," says Mr. Bishop, § 180, "that pregnancy will entitle him (the husband) on discovering the fact to have the marriage declared void. In some circumstances it will, in others it will not; depending on the extent and nature of the fraud in the particular instance, as appearing in the facts special to the individual case."

Applying these principles to the facts of this case, we think that under the evidence it was submitted to the jury with proper instructions. There was no sufficient evidence that the libellant had ever had sexual intercourse with the respondent before marriage. He positively denied it. The respondent indeed swore that it was his child. She admitted that she had said it was the child of Samuel Williams, but that it was at Allen's request upon a promise that if she would he would live with her. This again he utterly denied. It was a strange story, but the jury were the judges of the credibility of the witnesses. The child was born about seven months after the marriage, so that there could have been nothing in her appearance at that time to indicate her condition. It was certainly not necessary that she should have expressly denied her pregnancy before the marriage. No man would think of asking such a question of a woman he was about to make his wife. It would be regarded by her as an insult, if she was as he then supposed a virtuous woman. Upon the question of whether Mrs. Johnston was an expert, it was very much in the sound discretion of the court, and we never reverse in such cases unless the discretion has been grossly abused, which it certainly was not in this instance.

Decree affirmed and appeal dismissed at the costs of the appellant.

Decree affirmed.

NOTE BY THE REPORTER. — In *Scruggins v. Scruggins*, cited in the principal case, the child was born five months after the marriage, and the husband would not swear that he believed her chaste at the time of the marriage. RUFIN, J., said: "Concealment is not a fraud in such a case — disclosure is not looked for — active misrepresentations and studied and effectual contrivances to deceive are at least to be required, to give it that character; and the other party must appear not to have been voluntarily blind, but to have been the victim of a deception which would have beguiled a person of ordinary prudence. I know not how far the principle contended for would extend. If it embrace a case of pregnancy, it will next claim that of incontinence; it will be said the husband was well acquainted with the female and never suspected her, and has been deceived; then, that he was a stranger to her, smitten at first sight, and drawn on the sudden into a marriage

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with a prostitute; that he was young and inexperienced, hurried on by impetuous passion, or that he was in his dotage, and advantage taken of the lusts of his imagination, which were stronger than his understanding. From uncleanness it may descend to the minor faults of temper, idleness, sluttishness, extravagance, coldness, or even to fortune inadequate to representations, or perhaps expectations. There is in general no safe rule but this: that persons who marry agree to take each other as they are. * * * He who marries a wanton, knowing her true character, submits himself to the lowest degradation, and imposes on himself. No fraud can be said to be practiced on him by mere silence and concealment of other observations. * * * His attention must have been attracted to the person of the woman he was about marrying, and the long intimacy and courtship which he mentions must have enabled him to detect her situation. Why did he marry her? It may be possible that he was deceived, and not by his own negligence, at that period. But it is impossible that any art or device could have long prevented him from knowing the truth, that is, as far as this, that she was pregnant. If not by him, why did he live with her?" This was followed in *Long v. Long*, 77 N. C. 304; S. C., 24 Am. Rep. 440.

In *Reynolds v. Reynolds*, 3 Allen, 606, the wife was delivered five months after marriage; and the husband was seventeen, the wife thirty years old. The marriage was set aside. *Broom*, C. J., said: "The material distinction between such a case and a misrepresentation as to the previous chastity of a woman is obvious and palpable. The latter relates only to her character and conduct prior to the contract, while the former touches her actual present condition and her fitness to execute the marriage contract and take on herself the duties of a chaste and faithful wife. It is not going too far to say, that a woman who has not only submitted to the embraces of another man, but who also bears in her womb the fruit of such illicit intercourse, has during the period of her gestation incapacitated herself from making and executing a valid contract of marriage with a man who takes her as his wife in ignorance of her condition and on the faith of representations that she is chaste and virtuous. In such a case, the concealment and false statement go directly to the essentials of the marriage contract, and operate as a fraud of the gravest character on him with whom she enters into that relation." The court lay stress on the difficulty of ascertaining the fact before marriage by personal intercourse or inquiry, or after marriage, "where, as in the case at bar, the husband was immature and inexperienced." The court also expressly concede the doctrine of continuance of cohabitation after good reason to know the fact, and except the case where the pregnancy was known beforehand and the husband was deceived into the belief that he was the father. The latter state of facts existed in *Foss v. Foss*, 12 Allen, 26, and a divorce was denied; and much to the same effect is *Huffman v. Huffman*, 30 Penn. St. 417. *Reynolds v. Reynolds* was followed in *Donovan v. Donovan*, 9 Allen, 140, where it was also held that evidence of express representations of chastity was unnecessary.

In *Baker v. Baker*, 13 Cal. 87, the child was born between four and five months after the marriage. The divorce was granted. The court said: "We do not attach much importance to the suggestion that the plaintiff must have discovered the situation of the defendant long previous to the birth of the child, and that his silence thereupon must be regarded as an acknowledgment of its paternity. We cannot assume that he detected her pregnancy, and if he had reason to suspect it, that he must have done so at so early a period after marriage as to have referred it to ante-nuptial incontinence. To one, who we must believe from the evidence, possessed a strong affection for his wife, the suspicion of a want of chastity would never arise. Affection will give every excuse for appearances except that of dishonor." The court dwelt on the fact that the child would be presumptive heir of the husband's estate, and continued: "A woman, to be marriageable, must at the time be able to bear children to her husband, and a representation to that effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger, is not at the time in a condition to bear children to her husband, and the representation in this instance was false and fraudulent." After enlarging on the disgraceful situation of the husband, the court concluded: "By no principle of law or justice can a man be held to this humiliating and degrading position, except upon clear proof that he has voluntarily and deliberately subjected himself to it." Disapproving *Staggins v. Scroggins*.

In *Morris v. Morris*, Wright, 630, the complainant was "an honest simple fellow" of

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twenty-eight, "but little used to female society," and the defendant was a Quaker of thirty-five. The child was born in less than a month from the marriage. The marriage ceremony took place in the dusk, without lights, "under circumstances as to the position and movement of the bride, with an arrangement of the full Quaker dress of the ladies, which excited the suspicion of the clergyman. The husband and wife lived together without his suspicions being awakened, until the wife was taken in labor pains, and presented her wondering spouse a full grown child before the expiration of the honeymoon." A divorce was granted.

In *Ritter v. Ritter*, 5 Blackf. 81, the husband discovered the wife's condition the next night after the wedding and immediately left her. The statute authorized divorces for certain causes and for any other cause when in their discretion the court should think it reasonable and proper. The court below refused a divorce, but this was reversed, the court observing that "the court did not exercise its discretion in a sound and legal manner, having due regard to the rights of the injured party, and the purity of public morals."

In *Corrie v. Corrie*, 9 C. E. Green. 516, the child was born two months and a half after the marriage, the husband had had no previous connection with the mother, was very young, and was deceived by artifice of dress and conduct. A divorce was granted by the Court of Errors and Appeals, overruling the chancellor. The court exclude cases of mere incontinence, and mistake of the husband who had had previous connection. The court cited the Massachusetts and California cases. Two judges dissented.

Mr. Schouler says (Husb. and Wife, § 57); "We apprehend that the woman who brings surreptitiously to the marriage bed the incumbrance of some outside illicit connection introduces a disqualification to the union as real as the physical impotence of a man would be, resulting from his own lasciviousness."

MOORE V. PENNSYLVANIA RAILROAD COMPANY.

(90 Penn. St. 301.)

Negligence — contributory — infant trespassing on railway.

An intelligent boy, ten years of age, was sent by his parents on an errand on a street in a populous city, and while unnecessarily walking along a steam railway laid in the street, was killed by a train. *Held*, that his contributory negligence defeated a recovery by the parents.*

ACTION of damages for death of the plaintiffs' son by negligence. The opinion shows the facts. The plaintiff was nonsuited.

MacGregor J. Mitcheson, for plaintiff in error.

Wayne MacVeagh, for defendant in error.

GREEN, J. The only evidence in this case, as to the position of the deceased when he was struck, was that given by the plaintiffs' witness. He testified: "The boy was on the outer side, on the

* See *Nagel v. Missouri Pac. Ry. Co.* (75 Mo. 653), 42 Am. Rep. 418.

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end of the sleepers, walking at twenty to twenty-five feet north of telegraph pole; he was walking from sleeper to sleeper when I saw him; about a second of time from my sight of him, and when he was struck." He also said, "the lad was twenty or twenty-five feet north of telegraph pole when struck * * * walking on the outer edge of sleepers toward Orthodox street. Trees are planted in front of houses; there is a side-walk and trees outside; there is a three or three-and-a-half feet walk for passengers to Orthodox street." At another place he testified: "I squatted down to look under train running up, and saw boy on outer end of sleepers, walking; the train then was right on him; train struck him." The foregoing being the only testimony as to what the boy was doing at the moment he was struck, it was affirmatively established, and entirely undisputed, that the deceased was walking on and along the track at the time of the accident. He was not on the track at a public crossing, nor was he in the act of crossing. It is true that the railroad track at this place was laid upon the bed of a public street, and hence the right to cross it was not limited to the highway or street crossings. But the boy was walking along the track, and not across it, when he was struck. This he clearly had no right to do. There was an ample sidewalk and roadway for all foot passengers and others desiring to proceed in the same direction with the railroad. The boy was sent on an errand to a store on Orthodox street. He had not yet reached that street, but was going toward it. Instead of walking on the foot-walk at the side of the street, or even in the roadway, until he reached Orthodox street, and then crossing the railroad track, he appears to have diverged from both, if he was at any time upon either, and of that there is no evidence, and walked upon the cross-ties of the railway. This at least is all that appears in the testimony given by the plaintiffs, of which there is no contradiction. Of course, in such circumstances, he was a trespasser, and not only put himself in peril by his rashness, but also endangered the safety of any passing trains, and the lives of passengers. We have so frequently held that in such circumstances there can be no recovery, that it is unnecessary to quote the authorities. As the testimony was entirely undisputed, it was the duty of the court to pass upon it, which they did by directing a nonsuit. In this there was no error. The circumstance that the trespasser in this instance was a boy, ten years of age, cannot affect the application of the rule. The defend-

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ants owed him no greater duty than if he had been an adult. They are not subject to an obligation to take precautions against any class of persons who may walk on and along their tracks. In *Phila. & R. R. Co. v. Hummell*, 8 Wr. 375, the rule was applied to the case of a child seven years old. And so also in the latest case of the kind that has been before us, *Cauley v. Railroad*, 95 Penn. St. 398; s. c., 40 Am. Rep. 664, the rule was in nowise relaxed, although the person injured was a boy of tender years. In the first of these cases we used the following language, having reference to the facts in evidence :

“ But if the use of a railroad is exclusively for its owners or those acting under them ; if others have no right to be upon it ; if they are wrong-doers whenever they intrude, the parties lawfully using it are under no obligations to take precautions against possible injuries to intruders upon it. Ordinary care they must be held to, but they have a right to presume and act on the presumption that those in the vicinity will not violate the laws ; will not trespass upon the right of a clear track ; that even children of a tender age will not be there, for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act.”

This language is entirely appropriate to the present case, with the added force derived from the testimony of one of the plaintiffs that the deceased, his son, was a bright, intelligent boy, strong and healthy, and of rather exceptional capacity, and nearly ten years of age. If the rule against trespassers on railroad tracks is made to depend upon the intelligence and age of the trespasser it is easy to see that the law upon that subject will very soon become involved in inextricable confusion. Seeing no error in this record,

Judgment affirmed.

TRUNKY and STERRETT, JJ., dissented.

Fields v. Stokley.

FIELDS V. STOKLEY.

(39 Penn. St. 308.)

Nuisance — public — abatement.

The mayor of a city, by virtue of his office, may demolish a wooden dwelling-house in a city, which by reason of the combustible nature of its materials and the disorderly character of its occupants endangers the lives, health and property of neighboring residents. (*See note, p. 111*)

ACTION of damages for the destruction of a building. The opinion shows the case. The defendant had judgment below.

David W. Sellers, for plaintiff in error.

Wm. Nelson West, C. E. Morgan, Jr., and Rufus E. Shapley, for defendants in error.

SHARSWOOD, C. J. It appears by the record before us that it was expressly agreed, after the trial had progressed some time, that all the facts set forth in the special plea, not already proved, should be considered as having been proved. The plea, *inter alia*, avers that the houses mentioned in the declaration and for the removal of which this action was brought, were composed wholly of highly inflammable and combustible materials, and were insufficiently provided with chimneys and the usual and ordinary appliances for protection against fire, and were so used constantly, night and day, by drunken and disorderly persons, that the lives, health, and property of citizens were greatly endangered and the public safety imperiled. The question whether they were a public nuisance was fairly submitted to the jury by the learned judge below, and the verdict of the jury in favor of the defendant established that fact. Had the presentment by the grand jury been followed up by an indictment, trial and conviction of the plaintiff below, the judgment thereon would have been that the nuisance should be abated, and would have been a conclusive justification of the action of the defendant. The defendant was the mayor of the city, and charged with the conservation of the peace and the protection of the property of the city. He was the representative of the city. It is true that a wooden building, though erected contrary to law, is not *per se* a public nuisance. But it may become such by the manner in

which it is used or allowed to be used. It is true that a private person not specially aggrieved cannot abate a public nuisance, and especially where a statute provides a remedy for an offense created by it, that must be followed. It is well settled however that a private person, if specially aggrieved by a public nuisance, may abate it. In *Rung v. Shoneberger*, 2 Watts, 23, it was held by this court that the erection of a building upon the public square of a town was a public and not a private offense, and might be abated by any one aggrieved. In that case the buildings were removed by officers of the town by virtue of the authority of the town council and the persons in possession, and who had erected the buildings had recovered in an action of trespass. The judgment however was reversed, Mr. Justice ROGERS saying: "A nuisance, whether public or private, may be abated by the party aggrieved, so that it is done peaceably and without a riot. The reason (says Blackstone, 3 Com. 5) why the law allows this private and summary method of doing justice, is because injuries which obstruct or arrest such things as are of daily convenience and use require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice." The jury, under the charge of the learned judge, has found these buildings to be of that character. The city of Philadelphia was the owner of large and valuable property in their neighborhood. Any hour of the day or night they were in danger of being set on fire by those who frequented them with the owner's permission. It is stated as a fact in the special plea, and of course a fact admitted by the agreement, that the public safety was imperiled. Nothing more was necessary to justify the action of the defendant. If the owner or tenant of a powder magazine should madly or wickedly insist upon smoking a cigar on the premises, can any one doubt that a policeman or even a neighbor could justify in trespass for forcibly ejecting him and his cigar from his own premises? It is true, that a private person assuming to abate a public nuisance takes upon himself the responsibility of proving to the satisfaction of a jury, the fact of nuisance. The official position of the defendant as mayor of Philadelphia did not relieve him from his personal responsibility in this respect. But he has been sustained by the verdict of the jury, which is a justification of his alleged trespass. We are of opinion that this case was properly submitted to the determination of the jury, that there was nothing in the charge calculated to mislead them, and that it would have been manifest

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error, if the learned judge had affirmed the plaintiff's point, and thereby in effect instructed the jury to find a verdict in his favor.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Meeker v. Van Rensselaer*, 15 Wend. 397, it was held that a dwelling-house, cut up into small apartments, inhabited by a crowd of poor people, in a filthy condition, and calculated to breed disease, is a public nuisance, and may be abated by individuals residing in the neighborhood, by tearing it down, especially during the prevalence of a disease like the Asiatic cholera. The house had originally been a tannery, and under the floors were the old tan vats filled with putrid stagnant water, which oozed through the floor. And in *Harvey v. Dewdney*, 18 Ark. 258, the same was held of a house used in such a manner as to endanger a town by fire and to be offensive to the citizens. In this case the defendants were mayor, councilmen, etc., sued individually, and they justified under an ordinance ordering the demolition of the house. The court said: "It is clear, we think, from the plea, that the mayor and councilmen had the right to have the nuisance complained of removed or abated in some one of the modes provided by law, even though in doing so it should be found necessary to destroy the house or tenement, as was the case in the instance at hand. The measure was regarded and esteemed by the corporate authorities as rather of a mixed character, partly sanitary and partly economical, to preserve other adjacent property in the town; and as such, we hold that every citizen holds his property subject to such regulations. * * * The party aggrieved by a nuisance, whether the public or an individual, may either resort to the appropriate remedy in one of the forms hereinbefore designated, or else may avail himself or itself of the right to abate the nuisance." In *Davis v. Williams*, 16 Ad. & El. (N. S.), 546, it was held that where a house obstructs the exercise of a right of common, the commoner may, after notice and request to remove the house, pull it down, although the plaintiff is actually inhabiting and present in it.

But to justify such extreme measures the nuisance must be a physical and not merely a moral one, and the act must be necessary to the abatement. So, in *Brown v. Perkins*, 12 Gray, 88, it was held unlawful for persons whose relations and friends frequent a building to obtain intoxicating liquors sold there, to break it open and destroy the liquors. SHAW, C. J., said: "As it is the use of a building, or the keeping of spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such use." The like was held in *Gray v. Ayres*, 7 Dana, 375, of the destruction of a house which was the resort of criminals and disorderly persons, and used as a repository of stolen goods. The court said: "Although the destruction of the house might have been the most effectual mode of suppressing the nuisance, yet as the house itself was not a nuisance, nor necessarily the cause of one, its destruction was not a necessary means of abating the nuisance." "Although it may be in general true that individuals may abate a physical public nuisance by force, it is not in general true that they may use force in abating a public nuisance which is not of a physical or substantial nature; and therefore it is not true, as a general proposition, that they have a right to abate a nuisance of this kind, or that in doing so they may pull down a house because it is the seat of the nuisance," etc. So Lord Raymond said, in *Rex v. Papineau*, 2 Str. 688. "If a dye-house or any stinking trade were indicted, you shall not pull down the house where the trade was carried on." And so in *Welch v. Stowell*, 2 Doug. (Mich.) 323, where the marshal and aldermen, prosecuted for tearing down a house, undertook to justify under an ordinance requiring them to demolish the building as a house of ill-fame and a common nuisance. The court said: "The law undoubtedly authorizes the corporation of Detroit, or any person residing within its limits, to abate any nuisance that may exist. This right is one of the few exceptions to the general rule that no man shall take the law into his own hands; the exception finds its vindication in the law of necessity. It is a right however to be exercised with caution. Care must be taken that nothing is done but what is absolutely necessary to abate the nuisance. * * * It is said that the house was a nuisance. This may be very true; but it was a nuisance in consequence of its being the resort of persons of ill-fame. That which constitutes or causes the nuisance may be removed; thus, if a house is used for the purpose of a trade or business by which the

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health of the public is endangered, the nuisance may be abated by removing whatsoever may be necessary to prevent the exercise of such trade or business ; so a house in which gaming is carried on, to the injury of the public morals ; the individual by whom it is occupied may be punished by indictment, and the implements of gaming removed ; and a house in which indecent and obscene pictures are exhibited is a nuisance, which may be abated by the removal of the pictures. Thousands of young men are lured to our public theaters, in consequence of their being the resort nightly of the profligate and abandoned ; this is a nuisance. Yet in this, and in the other cases stated, it will not be contended that a person would be justified in demolishing the house, for the obvious reason that to suppress the nuisance such an act was unnecessary. So in the case before us, the nuisance was not caused by the erection itself, but by the persons who resorted there for the purposes of prostitution." The court distinguished *Meeker v. Van Rensselaer* on the ground that there was no way of abating the nuisance but by pulling down the building.

PEOPLE'S BANK V. KURTZ.

(90 Penn. St. 244.)

Corporation — implied warranty on sale of stock of.

On a sale of shares of corporate stock there is no implied warranty that the stock has not been fraudulently issued by the officers in excess of the amount authorized by the charter.

ACTION to rescind a purchase of notes with collateral transfer of shares of stock, and to recover the money paid, on the ground that the stock was an over-issue. The defendant had judgment below.

Hood Gilpin, F. C. Brewster and Charles Gilpin, for plaintiff in error.

Samuel Dickson and R. C. McMurtrie, for defendant in error.

SHARSWOOD, C. J. It was held at first that in an action on the case for deceit against a party who had sold a personal chattel to the plaintiff, to which he had no title, that it was necessary to aver a scienter. *Dale's case*, Cro. Eliz. 44 ; *Roswel v. Vaughan*, Cro. Jac. 196. But this doctrine was subsequently exploded, and an averment of possession considered sufficient, as the vendor must be intended cognizant of his own title, the sale being necessarily an affirmation of title. *Cross v. Gardner*, Carth. 90 ; *Medina v. Stoughton*, 1 Ld. Raym. 593. It may now be regarded as well settled, that a party selling, as his own, personal property of which he is in

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possession, warrants the title to the thing sold; and that if by reason of defect of title nothing passes, the purchaser may recover back his money, though there be no fraud or warranty on the part of the vendor. This doctrine is held to apply to choses in action as well as other descriptions of personal property. *Charnley v. Dulles*, 8 W. & S. 353.

Shares of stock in a corporation are choses in action, giving a right to dividends and an interest in the capital. The certificate is the evidence of such ownership, and there can be no doubt that if the certificate is forged, or the holder is not such *bona fide*, so that he has no claim on the corporation, the vendor would be liable to his vendee on the implied warranty of title. His possession of the certificate would be as to his vendee possession of the stock, just as possession of a bond or note is possession of the debt which they represent. Where however there has been a fraudulent over-issue of stock, evidence by certificate under the genuine seal of the corporation, the case presented is somewhat different. It has been settled, that a corporation is liable to *bona fide* holders of such fraudulent certificates, because like individuals, they are responsible for the fraudulent exercise of the power intrusted by them to their officers or agents. It is unnecessary, in this case, to consider whether they are bound to permit a transfer on their books and to deliver a new certificate to the *bona fide* vendee. It may be that when the over-issue is in excess of the amount authorized by the charter, they would not be. But it seems to be established, upon principle as well as authority, that the *bona fide* holder of such a fraudulent certificate would have a right of action against the corporation, and that his measure of damages would be the market value of his stock at the time the transfer was demanded. *Willis v. Philadelphia & Darby R. Co.*, 6 W. N. C. 461, and cases cited in the opinion of Judge HARE. The vendor of such a certificate has then a title which he can transfer, and a remedy against the corporation. Suppose the shares in the case before us had been transferred by an original subscriber, his vendee would have been in the same position as the assignee of shares subsequently issued in excess of the charter. He would have had a clear right to demand a transfer and new certificate. Such certificate however would have been worth to him only the value of the stock in the market at the time. If his transfer had been refused, he would be entitled to the same remedy and the same measure of damages. The vendor

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of shares of stock certainly does not warrant the solvency of the corporation. Corporations are especially liable to be made insolvent by the embezzlement and fraud of their agents or officers. It matters not whether the loss arises from robbery or embezzlement, or by the fraudulent issue of stock, the value of the stock is depreciated. It matters not whether such fraud or robbery was before or after the sale of the stock, the *bona fide* vendor cannot, under the rule in question, be held responsible for the depreciation in value. It is one of the risks which are assumed by all dealers in such securities. It is agreed in the case stated, that "the certificates were in the usual form, and regular on their face, and were issued by the duly constituted officers of the company, and were sealed with the genuine seal of the corporation." We are of opinion that the implied warranty of title extended no further, and that there was no breach.

Judgment affirmed.

AUER v. PENN.

(99 Penn. St. 370.)

Landlord and tenant — surrender of premises.

A lessee vacated the premises during the term, and gave the keys to the landlord, who took and retained them, but notified the lessee that he should hold him for the rent, and subsequently let the premises to another, after notifying the lessee of his intention to do so. *Held*, that the lessee was liable for the difference in the rent received.

ACTION against a surety on a lease. The head-note and opinion show the facts. The plaintiff had judgment below.

M. Arnold and *Wm. W. Kerr*, for plaintiff in error.

Wm. Gorman, for defendant in error.

PAXSON, J. Nothing is better settled in Pennsylvania than that a tenant for years cannot relieve himself from his liability under his covenant to pay rent, by vacating the demised premises during the term, and sending the key to his landlord. The reason for it is that in the absence of fraud, one party to a contract cannot re-

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scind it at pleasure. And the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise his tenant that he still holds him liable for the rent. All this, as was said by Mr. Justice ROGERS in *Marseilles v. Kerr*, 6 Whart. 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract and discharge him from rent. A surrender, a release or an eviction will undoubtedly relieve a tenant, and it was said by Chief Justice GIBSON, in *Fisher v. Milliken*, 8 Barr, 111, that nothing less would do so. This remark however was without the authority of the court, and must be regarded as dictum. The case in hand does not require us to assert so broad a proposition. There was neither a release nor an eviction here, but the surety claimed to be discharged because after the tenant, who was his principal, sent the keys to the landlord, the latter leased the property to another tenant. Yet there is no pretense that the landlord accepted a surrender; on the contrary the proof is clear that he declined to do so, and notified the defendant below that he would hold him for the rent. This notice was repeated on more than one occasion when he was about to lease the property to another tenant. Yet it was urged by the defendant below that such subsequent leasing by the landlord, and the acceptance of rent from the tenant, raised a presumption of a surrender. A surrender of demised premises by the tenant during the term, to be effectual, must be accepted by the lessor. The burden of proof is upon the tenant to show such acceptance. He sets it up to relieve himself from his covenant, and must prove it. When therefore the lessor retains the keys, and at the same time notifies the lessee that he will hold him for the rent, there is no room for the presumption of a surrender. Nor does the renting of the premises to another tenant under such circumstances raise such presumption, for the reason that it is manifestly to the lessee's interest that they should be occupied. The landlord may allow the property to stand idle, and hold the tenant for the entire rent; or he may lease it and hold him for the difference, if any. It was said in *Breuckmann v. Twibill*, 8 Norris, 58, that "taking possession, repairing, advertising the house to rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay rent." Much more is it to the interest of the tenant for the landlord to rent the premises. If at the same rent, the tenant is entirely relieved; if at less, he is liable only for the difference.

Vinton's Appeal.

Upon the trial in the court below the learned judge instructed the jury, as set forth in the second assignment of error, as follows: "If a man refuses to continue your tenant, gives up the house into your hands, why then you have a right to put a bill upon the house and try to rent it; because if you rent it, it is so much saved to Mr. Auer, so much saved to the surety of the tenant, because you have to give an account of every cent you make out of the house; and certainly it is much better for the tenant, that the landlord should rent the house and get something for it, than to simply lock the door and lay by and sue the tenant or surety for the whole amount of the rent for the whole term for which he has taken it; so that being for the benefit of both parties, it is no presumption that the landlord has accepted a surrender, that he has taken and leased the house."

We see no error in this. It is good sense as well as good law.

We are not aware of any authorities in this State which are in conflict with the foregoing views. Those cited on behalf of the defendant below certainly are not.

The remaining assignments do not require discussion. The fifth does not fully state the ruling of the court below. As it appears in the bill of exceptions it is entirely correct.

Judgment affirmed.

VINTON'S APPEAL.

(99 Penn. St. 434.)

Corporation — dividends — capital or income.

Where a corporation makes a dividend of the proceeds of a sale of part of its original franchise and property, it will be regarded, as between a life-tenant and a remainderman of part of the stock, as capital and not as income.

A PPEAL by Mrs. Sarah Vinton from the report of an auditor, settling the account of the Pennsylvania Company for Insurance on Lives, as trustee for her of shares of the St. Louis Gas-light Company. The opinion shows the point.

George Junkin, for appellant.

Vinton's Appeal.

J. G. Johnson and Edward Shippen, for appellees.

GORDON, J. The court below having ascertained beyond doubt, that the money in controversy was derived, not from the annual earnings or accumulations of the St. Louis Gas Company, but from a sale of part of its franchise and permanent property, thought it ought of right to belong to the *corpus* of the trust estate, and thereupon refused to award it to the life tenant. If we are to follow our own decisions as found in *Earp's Appeal*, 4 Ca. 368; *Pennsylvania Company v. Dovey*, 14 P. F. S. 260; *Moss's Appeal*, 64 Penn. St. 254; s. c., 24 Am. Rep. 164, and *Biddle's Appeal*, 99 Penn. St. 278, the opinion in which was delivered by Mr. Justice MERCUR, but a few days ago, we must affirm this conclusion. All these cases are similar to the one in hand; a gift of the income of stocks for life to one person, and the *corpus* over to another, and by all these we are instructed that in order to ascertain and settle the rights of these parties, we must endeavor to discover what is principal, or capital, as distinguished from earnings or dividends resulting from the use of capital.

More than this: following these authorities, we must go even farther, and capitalize, in favor of the remainder-man, the surplus profits which may have accumulated in the treasury of the corporation, prior to the date of the creation of the trust. The present case however does not carry us to this extent, for the money in controversy comes from a sale of a part of the original franchise and property of the gas company; in fact, part of the very *corpus* represented by the stock shares which form the principal of the trust created by the deed of James Martin.

The charter of this company clothed it with powers and privileges, not only very extensive, but very valuable. By this charter it had "the sole and exclusive privilege of vending gas lights and gas fittings in the city of St. Louis and its suburbs," and it was also empowered to "lay pipes, conduits, etc., in any of the roads and avenues of the suburbs, and in any of the streets and alleys of the city." Also by indenture of the 8th of January, 1841, between the city and the company, the sole and exclusive privilege of lighting the streets, alleys, wharves, public buildings and other public places, of the city of St. Louis, and of providing and furnishing the fittings and materials of all kinds, necessary for that purpose. The result of these grants, and a careful use of them, was great

prosperity to the company, and a corresponding rise in its stock. But this very prosperity begot opposition and danger. The city refused to abide by its contract, and to pay up its dues. Another company sprang up, the Laclede, which disputed the exclusive right of the old company to the territory mentioned in its charter. This led to the tripartite agreement of February 8, 1873, between the city of St. Louis, the Laclede Gas Company, and the St. Louis Gas Company, by which, among other things, the latter Company agreed to withdraw from about one-third or one-half of its former territory in favor of the Laclede, and also to sell to it all its mains, pipes, connections, lamps, lamp-posts, brackets, meters and all other of its property and effects situated and being within the territory from which it had agreed to withdraw.

In consideration of this sale and transfer, the Laclede company agreed to pay to the St. Louis company the sum of \$650,000. A dividend of \$600,000, of this money, was ordered by the directors, and of this, \$4,995 came into the hands of the Pennsylvania company as trustee of the one hundred shares of stock conveyed to it by the deed, or power of attorney, of James Martin. It is thus manifest that the money in dispute comes, not from the annual earnings of the company, but from a sale of part of its property; part of that very *corpus* which the stock shares represent, and without which those shares have neither substance nor value. If therefore the life-tenant is entitled to this money thus derived from the capital of this corporation, so in the end may she come to be entitled to the whole corpus of the trust. For the accomplishment of this result, it is only necessary that the St. Louis Gas Company should effect a sale of the balance of its property, and order a distribution of the money so raised among its shareholders. But logically the effect of such a doctrine is to defeat the whole object of the trust. Instead of securing for Mrs. Vinton a sure income for life, it gives her the principal to use at her pleasure, whilst the gift over to Frederick Vinton is wholly defeated.

A rule such as this, which may operate disastrously on a large and important class of our trusts, we cannot agree to adopt. It is indeed true, as said by Mr. Chief Justice CHAPMAN, in *Minot v. Paine*, 99 Mass. 101, that the rule which regards cash dividends, however large, as income, and stock dividends, however made, as capital, is a very simple and convenient one, and may relieve trus-

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tees and courts of much trouble, but it is certainly not one that commends itself for its justice and equity, neither does it at all regard the facts of the case like that of *Earp's Appeal*, or like the case in hand. To us, it seems like a bungling rule of law that at one time would give what is indisputably income to the remainder-man and at another, what is as clearly capital to the life-tenant. It is however enough for us that our own authorities repudiate such a rule. In the case last referred to, it was held that dividends from a corporate surplus fund, accumulated before the testator's death, must be regarded as part of the stock forming the trust fund, whilst after-accumulations, though distributed in the shape of stock, must be treated as income, and go to the life-tenant. In like manner it was held in *Wiltbank's Appeal*, that the earnings or profits of the stock of a decedent, made after his death, were income, though put into the form of capital by the issue of new stock, and it was there said, that "equity, seeking the substance of things found that the new stock was but a product, and was therefore income." So may we say in this case; equity seeking, not mere convenience, but the substance of things, finds the dividend in controversy to be part of the actual capital of the company; money raised by a sale of part of its original franchise and realty; that which its stock most specifically and directly represents, hence it awards the product to him in whom the stock is finally to vest. Assume the contrary doctrine, and that which we have already pointed out may at any time occur; on a sale of the entire franchise and property of the gas company, with a like order by its directors for a distribution of the money so raised, the dividends must go, regardless of the equities of the parties, to the life-tenant and nothing whatever be left for the remainder-man. This might be very convenient for trustees and courts, for as it would definitely close out the trust, there would be no further trouble about it; nevertheless the justice of such a disposition of the trust would be more than doubtful. Again this same doctrine, which makes a cash dividend income, and a stock dividend capital, would often work with equal harshness upon the interest of the life-tenant. For corporate earnings might be retained for an indefinite length of time, and then be distributed in the shape of stock shares, which the rule contended for would at once pronounce to be capital, and thus would the beneficiary be deprived of his or her income.

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Than this, far better is our Pennsylvania doctrine, admirably stated by our brother, Mr. Justice PAXSON, in *Moss's Appeal*, as follows: "But where a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity which disregards the form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits."

Decree affirmed with costs.

MERCUR, STERRETT and GREEN, JJ., concurred; SHARSWOOD, C. J., and PAXSON and TRUNKY, JJ., dissented.

CAMDEN AND ATLANTIC RAILROAD COMPANY V. HOOSEY.

(99 Penn. St. 402.)

Negligence — contributory — riding on car platform.

A passenger on a steam railway train, unable to find a seat, although there was standing-room inside, stood on the platform of a car, near the edge and was thrown off by an ordinary jolt and injured. *Held*, that he had no cause of action against the railway company.*

ACTION of damages for personal injury by negligence. The opinion states the facts. The plaintiff had judgment below.

Henry B. Freeman, and George M. Dallas, for plaintiff in error.

Edward A. Anderson, Francis E. Brewster, and John H. Fox, for defendant in error.

STERRETT, J. The single breach of duty with which the defendant below was specifically charged, as the only ground of liability to the plaintiff for the injury he sustained in falling off the platform of the car on which he was then standing, was the failure of the company to provide a sufficient number of cars to seat all the passengers on the train.

* See *Nolan v. Brooklyn R. Co.* (57 N. Y. 65), 41 Am. Rep. 345 and note, 345.

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Without assenting to the broad proposition contended for, that a railroad company using steam motive power is bound absolutely and under all circumstances to provide every passenger on the train with a seat, it cannot be questioned that as a general rule and under ordinary circumstances, it is the duty of such company to provide suitable car accommodations and seats for those whom it undertakes to carry; and if a passenger exercising reasonable care and prudence is injured in consequence of the company's neglect of duty in that regard, the latter is liable to respond in damages for the injury thus occasioned solely by its own negligence. There appears to be nothing in the circumstances of this case to exempt the company from that general rule of duty; and if its negligence was the proximate cause of the plaintiff's injury, the liability of the company would necessarily follow, unless the plaintiff himself was guilty of negligence which contributed thereto. His contention was, that in common with many other passengers, he was unable to procure a seat, and while searching for one he was thrown from the platform of one of the cars, and thus sustained the serious injury which resulted in the loss of his arm. The over-crowded condition of all the cars composing the train, and the consequent inability of the plaintiff and others to procure seats, were facts clearly proven.

Assuming for the present that the company was justly chargeable with negligence resulting in injury to the plaintiff below, and that under the circumstances he was not guilty of contributory negligence in passing from car to car in search of a seat while the train was in rapid motion, can it be pretended that it would not be gross negligence in him to voluntarily take a position near the outer edge of the platform and remain there until by an ordinary jolt of the car, he lost his equilibrium and was thrown off? This is precisely what the evidence as to the plaintiff's position at the time of the accident clearly establishes. Apart from his own testimony, there is very little evidence tending to show precisely where he was at and shortly before that time; and there is certainly nothing that militates against his own version of what then and there occurred. He testified in substance that on entering the cars at Atlantic City and finding the rear one over-crowded he pushed his way forward searching in vain for a seat, until he reached the front car. After remaining there a short time he started back; and quoting from his own testimony as found in the bill of exceptions, he says: "I left that car because I was tired standing there; had been there seven or

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eight minutes; started back through the cars; went through some ten or twelve cars; stopped several times going through; can't recollect time it took to go through back; could not get through for crowd; it was pretty near the same going back as coming through; I stopped outside on platform; rear platform of fourth or fifth car, right outside the door; stood on one side; the right hand side coming up. When I got out first I had hold of a little rail or something across the window; I held on to the little rail across the window to keep from falling off; let go to go through the cars; I was standing there a minute or two or so; it was two minutes to the best of my knowledge; can't tell if it was longer; when I left I started to go through, when the car got a jolt, and somebody struck me; could not count how many passengers passed through while I was on the platform; they were coming in the opposite direction, up toward the engine, and some were going through the same way toward the rear of the train; can't say whether the car door of the car I passed out of was open; when I went out of the door of the opposite car I am positive sure was open; saw parties coming from the opposite car; I did not stand aside inside of car because I could not see them well, and because I wanted to go through myself; I came out and stood with my back against the car, and hand on the rail, resting myself; I was leaning with my back against the car and my hand behind me; people were passing through into the car I left; there was a crowd; I left that car to go into an adjoining car; while standing there the car got a jolt, and somebody behind me struck me and staggered me; the jolt and it had something to do with it, can't tell whether the jolt without the other would have thrown me off; as soon as I got the jolt I made a grab with the right hand and missed and caught with the left the rail on the platform; there is a similar rail on the body of the car, to assist people in and off; I tried to get hold of the rail on the body; I was thrown partly round, and caught the dasher rail with my left hand; I was thrown with my chest toward the inside track; the train was travelling very rapidly; my arm was mangled."

It is very evident from the plaintiff's own statement that at the time of the accident and for some minutes before he was not in the act of passing from one car to another in search of a seat; on the contrary he was standing quite near the edge of the platform with his back to the end window of the car. He was not only in a position of known danger, but was there voluntarily and in disregard

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of the rules of the company. There is nothing in the testimony from which a jury would be justified in coming to any other conclusion. While he was thus standing on the platform, persons passed from one car to the other in both directions, and there is nothing whatever to show that he could not have gone into the next car if he had been so disposed. Neither he nor any other witness pretends to say it was necessary for him to stop and stand on the platform.

In the seventh point of the defendant below, the court was requested to charge "That even if a search for a seat was the real purpose of the plaintiff in going out on the platform, and even if it were not negligence for him to have crossed from car to car for that purpose, yet if the jury believe from the evidence that he lingered on the platform, instead of immediately crossing, the verdict should be for the defendant." The learned judge, in affirming this proposition, added the qualifying words, "unless compelled thereto by circumstances." The jury was thus authorized to inquire whether or not the plaintiff was compelled by circumstances to linger on the platform. We see nothing in the testimony to warrant the submission of this inquiry to the jury. As already intimated there was not a particle of testimony from which it could be reasonably inferred that plaintiff was compelled to take or retain the position he did on the platform. Having shown by his own testimony that at the critical juncture he was in a position where no one of ordinary prudence should have placed himself, it was incumbent on him to prove that he was there from necessity and not from choice. While the latter was clearly shown, there was no testimony tending to prove the former. The point should have been affirmed without the qualification complained of. But for reasons already suggested we think the court should have gone further, and instructed the jury as requested in defendant's ninth point, which was: "That the evidence shows negligence on the part of plaintiff which contributed to produce the injury complained of, and therefore he cannot recover."

The dangerous position on the platform in which the plaintiff voluntarily placed himself, while the cars were in rapid motion, was undoubtedly the immediate cause of his being jolted off. If there had been any testimony from which it could have been reasonably inferred that he was there from necessity and not from choice, it would have been a question for the jury; but in the ab-

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sence of such evidence, it was error to refuse the point and leave it to the jury to determine whether he was or was not guilty of contributory negligence.

Of all the passengers on a long train of twenty over-crowded cars the plaintiff was the only one who appears to have been injured. If he had submitted, as many others did, to the inconvenience of standing inside the cars, or if he had been guilty of no greater imprudence than passing from car to car while the train was in rapid motion, it is not at all probable he would have been injured. His much-to-be-regretted misfortune was the result of his own carelessness. This was clearly proved by uncontroverted testimony, from which no other conclusion could reasonably be drawn.

Judgment reversed.

SHARSWOOD, C. J., and PAXSON and GREEN, JJ., concurred; MERCUR, GORDON and TRUNKY, JJ., dissented.

RENICK V. BOYD.

(99 Penn St. 555.)

Replevin — crops — statute construction — "other property."

Replevin will not lie for crops severed by the person in possession of the land under claim of title, either at common law or under a statute enabling the owner of the land to maintain replevin for timber, lumber, coal or "other property" severed therefrom.

REPLEVIN for hay, oats and corn. The opinion states the facts. The defendant had judgment below.

Wm. M. Hayes, and *A. P. Reid*, for plaintiff in error.

Chas. H. Pennypacker, and *John J. Gheen*, for defendant in error.

GREEN, J. These were two actions of replevin, brought to recover certain hay, oats and corn, after the same had been harvested upon land of which the defendant was in the actual and adverse possession, both before and at the time the crops were gathered. The plaintiff had brought an action of ejectment against the de-

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pendant to recover possession of the land, and this action was pending at the time the crops in question were severed from the freehold. The plaintiff claims that he is entitled to recover in this action under the provisions of the act of May 15, 1871, P. L. 268. That act is as follows:

“In all actions of replevin now pending or hereafter brought to recover timber, lumber, coal or other property severed from the realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute: Provided said plaintiff shows title in himself at the time of severance.”

The learned judge of the court below held that this act was not intended to apply to the case of growing crops severed by the person in possession under claim of title to the land on which the crops were grown. In this opinion we concur. Prior to the passage of the act in question, it had always been held that replevin would not lie by one out of possession to recover against one in possession and claiming title, for any kind of chattels which had become such by severance from the freehold of which they had previously formed a part. Thus in *Brown v. Caldwell*, 10 S. & R. 114; 13 Am. Dec. 660, it was held replevin does not lie by one not in the actual exclusive possession of land, whatever title he may claim, against one who is in the actual, visible, notorious, exclusive possession and occupation thereof, claiming the right for slates taken out of a quarry on the land.

In *Powell v. Smith*, 2 Watts, 126, in the application of the same doctrine, we held that replevin would not lie to recover fixtures separated and removed from a mill. On page 127, GIBSON, C.J., said: “The principle which is to govern this case was settled in *Mather v. Trinity Church*, 3 S. & R. 509; 8 Am. Dec. 663; *Baker v. Howell*, 6 S. & R. 476, and *Brown v. Caldwell*, 10 id. 114; in which it was determined on principle and authority, that the right of property in a chattel which has become such by severance from the freehold cannot be determined in a transitory action by a trial of the title to the freehold, because the title to land might otherwise be tried out of the county. An action of trover or replevin for such a chattel therefore does not lie by a plaintiff out of possession. * * * Independent of this technical inhibitory principle, which however is decisive, it would provoke much useless litigation and be attended with great practical mischief, if an owner out of possession were

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suffered to harass the actual occupant with an action for every blade of grass cut, or bushel of grain grown by him, instead of being compelled to resort to the action for *mesne* profits, after a recovery in ejectment, by which compensation for the whole injury may be had at one operation." Other authorities are to the same point. The act of 1871 has doubtless changed this rule so far as it relates to the particular forms of property there mentioned. These are timber, lumber, coal and other property, severed from the realty. It is claimed that growing crops come within the designation "other property," and therefore that the act includes them also. But a very slight consideration of the act shows not only that they are not expressly mentioned, but that they are not necessarily implied, under this general description. There are many other forms of property besides timber, lumber and coal, which constitute part of the realty. Thus slate, marble, iron ore, zinc ore, and all other forms of minerals and ores in place, building-stone and fixtures and machinery of every description which have been permanently affixed to the realty. To all of these the expression "other property" in the act may well be applied.

They are of the same generic character with the other kinds of property expressly mentioned. That is they are a part of the realty itself, and when converted into personalty, it is by an act of severance such as works a conversion of timber, lumber and coal. Now growing crops are only ephemeral. They are produced, not by nature as a part of the land, but by the labor of man, combined with the operations of nature, and are never intended to become permanently affixed to the freehold, but to be removed from it at maturity. The very purpose of their cultivation is to make them personalty. Hence the spirit and meaning of the act in no sense requires that they should be considered in the same category with such constituent elements of the earth as timber, lumber and coal. In *Allen's Appeal*, 32 P. F. Smith, 302, the words of an act giving a preference for wages to persons employed, "in any works, mines, manufactory or other business, etc.," were construed to apply only to any other business *ejusdem generis*. The same rule of construction applied here would exclude growing crops as not being of the same kind or class with those expressly named in the act. We consider that the purpose of the act was to remedy a different kind of evil, which existed prior to its passage. Formerly when one in possession cut down standing timber or severed and removed coal,

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slate, ores, or minerals from the realty, the only remedy of the true owner was by the action for *mesne* profits or by estrepement or other proceedings to stay waste. But these were not adequate, as the tenant in possession could make way with and convert these articles, and being insolvent, a verdict and judgment for damages or a mere preventive order staying future acts, furnished no sufficient relief; and we apprehend it was the purpose of this act to remedy this class of wrongs. These considerations are inapplicable however to the case of growing crops. They are generally the fruits of the labor of the tenant in possession, and it would be a most serious innovation upon the existing state of the law, as well as a great hardship upon the person in possession under claim of title, to subject him to a succession of actions for his various crops when harvested, and to the necessity of trying complicated and vexatious questions of title to land, in the determination of the ownership of his fruits, vegetables and crops. Such a construction is not required by any reading of the act, and is therefore not necessary to be made.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

DAVIS V. STATE.

(68 Ala. 58.)

Constitutional law — interference with private property.

A statute declaring it unlawful, within certain counties, to transport or move after sunset and before sunrise of the succeeding day any cotton in the seed, but permitting the owner or producer to remove it from the field to the place of storage, is not unconstitutional.

CONVICTION of unlawfully moving cotton in the seed. The opinion shows the point.

J. S. Diggs, for appellant.

H. C. Tompkins, attorney-general, for State.

SOMERVILLE, J. The indictment in this case, which was found at the fall term of the Circuit Court of Dallas county, charges that William Davis, the appellant, "did, after sun-down and before sunrise of the succeeding day, transport or remove, in Dallas county, cotton in the seed, against the peace and dignity of the State of Alabama."

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The questions raised involve the sufficiency of the indictment, and the constitutionality both of the law, under which it was found, and under which the grand jury finding it was organized. The points are presented by demurrer and motion made in arrest of judgment, both of which were overruled by the Circuit Court.

The grand jury, by which the indictment was found, and the petit jury by which the appellant was tried, were drawn and organized under the provisions of an act, approved December 19, 1876. Session Acts 1876-77, pp. 190-193. This act, which is specially applicable only to the county of Dallas, and five other counties in the State, provides for the appointment of five commissioners by the governor, in each of the counties designated, who are authorized to discharge and perform, in their respective counties, all the duties in relation to the [s]election and drawing of grand and petit jurors, now required by law to be performed by the judges of probate, sheriffs and clerks of the Circuit or city courts of said counties. The duties, term of office and compensation of these commissioners are prescribed, as also the qualification of the jurors to be selected. It is entitled "An act to secure more effectually competent and well qualified jurors in the counties of Montgomery, Lowndes, Autauga, Dallas, Perry and Bullock."

We can see no valid objection to this act on constitutional grounds. There is no prohibition to be found in the Constitution, express or implied, as held by this court, in *Williams v. State*, 61 Ala. 33, which limits or restrains the power of the legislature to regulate the entire subject of the selection and organization of juries, or to make a special law, applicable to particular counties or designated localities, varying in its provisions from the general law of the sovereign jurisdiction. And this conclusion may be said to be based on a principle recognized by the best writers on constitutional law. Cooley on Const. Lim. 170.

The present indictment is found under section 2 of an act of the legislature, entitled "An act to prevent, in certain cases, the sale, exchange and transportation of cotton in the counties of Montgomery, Bullock, Dallas, etc." Acts 1878-79, p. 206.

The first section of this act makes it unlawful, with certain reservations, for "any person to sell or offer for sale, barter, exchange or buy," within the specified localities, "any cotton in the seed," or to sell or offer for sale, etc., any cotton in the seed produced in said localities.

Section 2 provides, "that it shall not be lawful for any person to transport or move, after sunset and before sunrise of the succeeding day," in said localities, "any cotton in the seed." A proviso permits the owner or producer of the cotton to remove it from the field, where it is grown, to the gin-house or other place of storage of such owner or producer. Section 5 makes it a felony where any one "knowingly violates" any of the provisions of the act, and affixes punishment by confinement in the penitentiary.

It is insisted that this act is in violation of the Constitution and therefore void, as an improper exercise of legislative power; that it unjustly and injuriously discriminates against the particular counties included in the law, and subjects persons resident there to deprivation of liberty and property, without due process of law, within the meaning of § 7 of art. 1 of the State Constitution (1875), and of § 1, art. 14 of the amendments to the Constitution of the United States.

We confine our discussion of this objection to section 2 of the act in question, the one under which the indictment is found.

In our inquiries into the nature and limits of legislative power, as affecting this subject, we are not disposed to controvert or materially qualify the principle so emphatically enunciated by this court, in *Dorman v. State*, 34 Ala. 216 (236); that there are no limits to the legislative power of the State government, save such as are written upon the pages of the State or Federal Constitution. "It has never been questioned, so far as I know," says REDFIELD, C. J., in *Thorpe v. R. Co.*, 27 Vt. 142, "that the American legislatures have the same unlimited power in regard to legislation, which resides in the British Parliament, except where they are restrained by written Constitutions. That must be conceded, I think," he says, "to be a fundamental principle in the organization of the American States." Cooley on Const. Lim. 88-89. And this power and jurisdiction of Parliament, as expressed in the familiar language of Sir Edward Coke, "is so transcendent that it cannot be confined, either for causes or persons, within any bounds." 2 Coke Inst. 36.

This great constitutional axiom is, of course, to be taken as qualified by the necessary implication that the act, which is subjected to scrutiny, is purely legislative in its nature and not judicial nor executive.

"This court," as said by CHASE, C. J., in the *License Tax* case,

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5 Wall. 469, "can know nothing of public policy except from the Constitution and the laws, and the cause of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient, or inexpedient, as politic or impolitic. Considerations of that sort must be addressed to the legislature. Questions of policy there are concluded here."

"If," as said by Mr. Justice WALKER, in *Dorman v. State*, *supra*, "while keeping within the limits which the sovereign power has prescribed for its action, it (the legislature) yet violates the abstract principles of justice, and disregards the boundaries of natural right, there is no remedy save in the punitive power of public opinion, and the right of the people to change the representatives of their legislative sovereignty, and through them to repeal the obnoxious enactment." 34 Ala. 235.

It is argued that this statute, under consideration, is such a despotic interference with the right of private property as to be tantamount, in its practical effect, to a deprivation of ownership "without due process of law." The definitions of this phrase "due process of law," are so various, in the reported American decisions, that it would be unsatisfactory to attempt an accurate definition of it here. *Omnis definitio in jure periculosa est*, is a wise maxim of judicial caution, a want of proper regard for which has aggravated that proverbial uncertainty of the law, so frequently charged to be its chief reproach. It is sufficient to say that this constitutional barrier was "intended to protect property from confiscation by legislative enactments, and from seizure, forfeiture and destruction, without a trial and conviction by the ordinary modes of judicial proceeding." *Wynehamer v. People*, 3 Kern. 378 (20 Barb. 567); *Zeigler v. S. & N. R. Co.*, 58 Ala. 594. It is not, nor can it be maintained, that the act in question goes, or attempts to go thus far. It has never been seriously questioned that the *jus disponendi* is not an absolute, unqualified or indispensable right attaching to property, but is subject to such regulations, not inconsistent with the Constitution, as in the judgment of the law-making powers, the interests of society and good government, may require. *Wynehamer v. People*, 20 Barb. 567 (604); *Dorman v. State*, *supra*. The prohibition in section 2 against transporting or moving is confined to "cotton in the seed," and to such hours as intervene between sunset of one day and sunrise of the succeeding

day. It does not inhibit all transportation, but seeks only to regulate and control it, in one particular condition of a commodity. We regard this as a mere police regulation, the alleged impolicy or injustice of which is beyond the legitimate scope of judicial criticism. The primary object of this law is not to interfere with the right of property or its vendible character. Its object is to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which in the opinion of the law-making power may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits to the public detriment, at least within the specified territory. This the legislature had the power to do. *Tiffany's Gov. & Const. Law*, § 318; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Bartemeyer v. Iowa*, 18 Wall. 129. There is no constitutional objection to it. *Munn v. Illinois*, 94 U. S. 113. In discussing the subject of a prohibitory liquor law, confined to a specified locality, which was urged as being violative of this same clause in the Constitution, WALKER, J., in *Dorman v. State*, *supra*, used the following language, to which it is not necessary, for the purpose of this case, that we should give our unqualified assent: "The prohibition," says he, "must be of such a character as in effect to annihilate, within the entire domain covered by the legislative authority, the quality of sale which makes the property valuable to the owner, and thus to sweep it as an article of traffic from the commerce of the State. If any substantial right of sale within the State is left untouched by the law, this it is admitted will save its validity." 34 Ala. 242.

It is further argued in substance, though not in so many words, that this act operates as a denial by the State to certain persons of that "equal protection of the laws" which is secured to every citizen by section 1, article 14 of the Amendments to the Constitution of the United States.

There is nothing in our opinion, in either the Federal Constitution or that of the State, which prevents the legislature from enacting local laws, different in their provisions from the general Code of laws for the State, and operating only in certain counties or limited territorial districts. This principle is sustained by the best approved writers on constitutional law, and was settled by this court more than twenty years ago in *Dorman v. State*, *supra*, and again more recently in *Board of Revenue v. Barber*, 53 Ala. 589; *Cooley on Const. Lim.* 170.

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It was also discussed and fully established by the Supreme Court of the United States in the very recent case of *Missouri v. Lewis*, 101 U. S. 22. It is there held that "a State may establish one system of law in one portion of its territory and another system in another," within the limitations of the Constitution, provided it does not deny to any person within its jurisdiction "the equal protection of the laws in the same district." And it is asserted that each State has full power to make for municipal purposes, political divisions of its territory, and regulate their local government."

Mr. Justice BRADLEY, in delivering the opinion of the court, says: Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by any thing in the Constitution of the United States, including the amendments thereto." And again: "If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said it has respect to persons, not classes. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place or under like circumstances. Id. 31.

Suggestion merely, and not argument, is needed to show that this legislative enactment, severe as it may be in its penalties, affixes equal punishment upon all persons, without exception, who may violate its provisions.

The objection is urged by the appellant that the indictment uses the words "transport or remove," while the words of the act are "transport or move." While it is the better practice, as said by BRICKELL, C. J., in *Holly v. State*, 54 Ala. 238, to follow the exact words of the statute, those equivalent in meaning are sufficient. We consider the words "move" and "remove," as here used, to be equivalent in meaning.

We are of opinion however that the indictment is defective in another respect. It fails to charge that the defendant knowingly committed the act for which he is criminally indicted. The statute is highly penal in its character, and creates a new crime unknown to the common law. Section 5 makes knowledge of the facts essential to the crime, deeming him alone guilty "who knowingly violates any of the provisions" of the act. The general rule of

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pleading is that every indictment, information or other criminal proceeding, ought to contain all that is material to constitute the crime, or every necessary ingredient of the offense, stated with precision, or at least certainty, and in the customary forms of law. 3 Greenl. Ev., § 10; *Beasley v. State*, 18 Ala. 535. A crime is committed only by a combination of act and intent. "No amount of intent alone is sufficient, neither is any amount of act alone; the two must combine." 1 Bish. Cr. Law, § 430 (6th ed.). In the particular crime here charged, there are forcible reasons for the application of this rule requiring the indictment to state the guilty *scienter*. The transportation of the prohibited commodity may have been done ignorantly. The defendant may honestly have believed that he was without the prohibited jurisdiction.

For this defect, the judgment of the Circuit Court must be reversed and the case remanded. In the meanwhile the defendant will remain in custody until discharged by due course of law.

Judgment reversed.

CULVER V. HILL.

(66 Ala. 66.)

Damages — for failure to repair fences.

A landlord agreed in a lease of a farm to repair the fences so as to secure the crop. He failed to do this, and cattle broke in and injured the crops. *Held*, that he was liable therefor.

ACTION for rent. The opinion states the point. The defendant had judgment below.

James G. Cowan, for appellants.

W. C. Oates, for appellee.

STONE, J. Hill became tenant of Culver, at a stipulated rent. The farm, the subject of the lease, was defectively fenced, and one of the terms of the letting was, that Culver, the landlord, "was

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to fix up the fencing inclosing said land, so as to secure the crop " to be made. The fencing was not sufficiently repaired, and much of the crop, after being grown, was destroyed by stock breaking in. The question is, whether the landlord is liable for the injury caused by the breaking in of the stock.

For breaches of warranty, or other contract in the nature of warranty, " the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract ; that is, must be such as might naturally be expected to follow its violation." *Passinger v. Thorburn*, 34 N. Y. 634. " Profits which would certainly have been realized, but for the defendant's default, are recoverable; those which are speculative, or contingent, are not." *Griffin v. Colver*, 16 N. Y. 489. Damages which are the natural consequence of the breach of the covenant or contract can be recovered. *Dervint v. Wiltse*, 9 Wend. 325. " The plaintiff is entitled to such damages as necessarily and naturally flow from the act of the defendants." *Jeffreys v. Bigelow*, 13 Wend. 518 ; 28 Am. Dec. 476; *Marsh v. Webber*, 13 Minn. 109.

Suit on covenant to teach two slaves of plaintiff the arts of ship-carpentry and caulking, which covenant, the declaration alleged, had been broken. It was proved that a slave, skilled in those trades, would thereby have his value increased three hundred dollars. Under the instruction of the primary court, the jury assessed the damages at six hundred dollars ; thus taking, as the measure, the injury the plaintiff had sustained in not having his slaves so instructed. The revising court approved the rule on which the damages had been admeasured, and said : " If the defendants had performed their covenant, the plaintiff would have been benefited, to that amount, in the increased value of each of his slaves, and of that he was deprived by their default." *Bell v. Walker*, 5 Jones, 43 ; see also *Lord Sandes v. Fletcher*, 5 B. & Ald. 835 ; *White v. Mosely*, 8 Pick. 356 ; *Garrett v. Stuart*, 1 McC. 514 ; *Rose v. Beattie*, 2 N. & McC. 538.

The case of *Lecroy v. Wiggins*, 31 Ala. 13, grew out of a mutual executory agreement, which looked to future rights of enjoyment. Wiggins violated his part of the agreement, and rendered it impossible for Lecroy to realize the benefits of the contract. This court said : " The injury to the plaintiff by a sale, when he had been for some time receiving the benefit of the contract, was the value of the rights under the contract, of which he was deprived by such

sale." In *Terry v. Eslava*, 1 Port. 273; 27 Am. Dec. 626, plaintiff had paid defendant twelve hundred dollars to abstain from the use of certain cotton-presses, which contract defendant had violated. The Circuit Court instructed the jury, that the sum paid, \$1,200, was the measure of plaintiff's right of recovery. This court said, the damages were to be estimated according to the amount of the injury sustained.

We have a class of cases where the rule is laid down, that in actions to recover for a breach of a covenant, or stipulation in a contract, the measure of recovery is the actual injury caused by the breach; and this is the general measure of damages for the breach of a contract. *Garrett v. Logan*, 19 Ala. 344; *Miller v. Garrett*, 35 id. 96; *Kelley v. Cunningham*, 36 id. 78; *Drake v. Webb*, 63 id. 596, and authorities cited. In *George v. Cahaba & M. R.*, 8 Ala. 234, this court said: "It is perhaps impossible to ascertain any one rule that will cover all classes of contracts, in regard to the damages which may be awarded to the injured party." We may add, we have encountered no question requiring judicial determination, which is more difficult to be defined, than a general rule, or set of rules, declaring the proper measure of damages, in the varying phases of the inquiry. That the injury must be the natural and proximate result of the tort, or breach of contract, is a cardinal rule. Accidental consequences, not likely to ensue from the wrong done, are generally too remote to be the foundation of a recovery. 1 Brick. Dig. 522-23, §§ 8, 22.

It is contended for appellant, that when Culver failed to repair the fence, according to contract, it was Hill's duty to do the work, or have it done; and that in this action, he can only recover what it would have cost him to have the necessary repairs made. The case of *Murrell v. Whiting*, 32 Ala. 54, is cited in support of this view. That was a suit on a charter party of a sea-going vessel, and the breach assigned was, that the charterer failed to furnish a cargo for the voyage, which the contract bound him to furnish. This court said: "In the absence of special circumstances to the contrary, the law makes it the duty of the master of such a ship as that of the plaintiffs, in case of the failure or refusal of the charterer to furnish the cargo as agreed on, to avail himself of the ordinary means, and of all proper opportunities, to obtain another cargo. * * * If by performing that duty the loss from the defendant's breach of contract would have been mitigated, the fail-

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ure to perform it deprives the plaintiffs of the right to recover any damages or loss which would have been avoided by its performance." The principle declared in this case is a little variant from that settled in a kindred class of cases, where one by executory agreement binds himself to serve another for an agreed compensation. In such case, if the hirer, without justifiable cause, refuse to allow the laborer to perform his contract, the latter may continue to treat the contract as in force and binding, and after the termination of the agreed term of service, or as the installments mature, may sue and recover as if he had performed his part of the agreement; with this qualification, that if in the meantime the employee has realized any thing from his labor, or if he had an opportunity for employment and did not accept it, then the employer is entitled to a credit for the sum he thus realized, or might have realized. *Fowler v. Armour*, 24 Ala. 194; *Wright v. Falkner*, 37 id. 274; *Davis v. Ayres*, 9 id. 292; 2 Greenl. Ev. 261a, and note; see also *Strauss v. Meertief*, 64 Ala. 299; s. c., 38 Am. Rep. 8. And in such case the burden is on the defendant to show that plaintiff had obtained, or could have obtained employment, and declined it.

The present case, in its circumstances, is distinguishable from any we have been considering. Hill, the tenant, bound himself to cultivate and harvest a crop. This under ordinary circumstances would require his labor and attention pretty much the entire year. Culver, the landlord, it is shown, "was to fix up the fencing inclosing said land, so as to secure the crop." This was a contract of mutual stipulations; and from its terms we are authorized to infer the fence was insufficient, and that in the absence of Culver's promise to repair, Hill would not have taken the lease. Fence, *ex vi termini*, imports a defense or protection of the crop, or other thing within the inclosure. Protection was its object, and it was that the parties had in contemplation. Destruction or loss of the crop, if the fence remained insufficient, would naturally be expected to follow. We think the damage in this case was the natural and proximate result of Culver's breach of contract, that Hill had a right to repose on his promise to repair, and that the Circuit Court laid down the true rule for the measurement of damages in such a case as this. In the first charge, given at the instance of plaintiff, the court extended to him the full measure of his rights. We agree with the Circuit Court in holding that it was

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not legally incumbent on defendant to make or procure rails to repair the fence, at the expense or with the labor which the testimony shows would have been required. The diligence required of him did not extend so far.

Affirmed.

Judgment affirmed.

CITY NATIONAL BANK OF SELMA V. BURNS.

(68 Ala. 267.)

Bank — payment of check.

A bank, not accustomed to receive, for collection, checks drawn upon itself, received a check drawn by one of its depositors in favor of another, credited it in the payee's pass-book, put it on the file of paid and cancelled checks, and credited the payee and charged the drawer with it in the books of the bank. *Held*, that this constituted payment, and could not be retracted on discovering that the check was an overdraft and the drawer was insolvent.

ACTION on a check. The opinion states the facts. The plaintiff had judgment.

Jas. W. Lapsley, Wm. R. Nelson, and Pettus, Dawson & Tillman, for appellant.

Brooks & Roy and W. C. Ward, contra.

BRICKELL, C. J. The first and second instructions requested by the appellant affirm as matter of law, that if the drawer, and payee and holder of a check are customers of the bank on which the check is drawn, the mere presentment of the check by the holder to the bank, and the noting or entry of it by the bank as a deposit on his bank-book, is not a payment; and if within a reasonable time the bank ascertains the check is an unauthorized overdraft, and offers to return it, there is no liability to the depositor. These instructions could have been properly refused, because they in effect withdraw from the consideration of the jury facts, which in any

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point of view, are very material in determining the liability of the bank for the payment of the check drawn by Hudson, Kennedy & Co. These facts are, that the appellant did not receive, for collection, checks of which it was the drawee; and when this check was presented, not only made an entry of it on the book of the depositor, but placed it on the file of checks paid, and to be charged to the drawers, on which checks received for collection were not placed, and subsequently on its books charged the drawers, and credited the appellee, the holder, with it. The theory on which the instructions proceed is, that the check was received by the bank for collection, and that it was the mere agent of the appellee, bound only to the use of diligence in obtaining for him payment of it. Whether this theory is true or not, depends upon the intention of the parties, and the facts to which we have alluded are certainly of importance in ascertaining that intention. A court is not bound to give instructions to the jury, even when they affirm correct legal propositions, which withdraw material evidence from their consideration, or which, to prevent them from misleading, would require additional instructions.

We do not propose, however, after the very full argument of the important question in controversy upon this ground, to decline its examination. The facts are that Hudson, Kennedy & Co., cotton factors in the city of Selma, were indebted to the appellee in the sum of one thousand and thirty-one dollars, for the payment of which, on Saturday, March 2, 1878, they gave him a check on the appellant, payable to the order of Burns & Co., the name under which he was doing business. On the ensuing Monday morning, at about nine o'clock, the appellee presented the check, bearing his indorsement, to the cashier of the appellant with his bank-book. The cashier entered it as a deposit on the bank-book, placed it on the file of checks to be charged on the books of the bank to the drawers, and subsequently on the books the appellee was credited, and the drawers charged with it. It was not the appellant's course of business to receive, for collection, checks of which it was the drawee, nor were checks it received for collection placed on the file on which this check was placed. In the afternoon of that day, Hudson, Kennedy & Co. failed, and on examining their accounts, it was ascertained the check was an overdraft. The appellant endeavored immediately to give the appellee notice, and made an offer to return it on the next day, but the appellee de-

clined to receive it, and claimed that it was paid, and the appellant liable to him for its amount, as money deposited with it.

There is some contrariety of decision as to the liability a bank incurs, when a check of which it is the drawee is presented, and there is simply an entry of it to the credit of the holder on his bank-book, as a deposit, whether it is to be regarded as paid, or as received for collection. In *Morse on Banking*, 320, it is said: "If the bank, as probably happens in the great majority of cases, simply takes the check without especial remark, and notes it in the depositor's bank-book, thus treating it in every respect as if it were a check upon any other bank, instead of upon itself, these facts do not create a payment, or render the bank liable for the amount to the depositor. The officers, having dealt with the check in the ordinary form, have placed the bank only under the ordinary obligation, to wit: that of collecting the check in the due course of business for the benefit of the depositor. The collection is not complete, and the bank does not become indebted to the depositor for the amount, until the credit has been actually transferred." There are several adjudged cases referred to, as supporting this view of the question. The first is that of *Boyd v. Emerson*, 2 Ad. & Ell. 184, in which the plaintiff, a customer of a banking house, carried to it a check payable to himself, drawn by another customer, and left it with instructions to place it to his credit, or to his account. The check was not cancelled, or debited to the drawer, or credited to the plaintiff. The bankers having made inquiries about the drawer, who had already overdrawn his account, gave notice to the plaintiff on the next day, that the check would not be paid. It was held that a promise to pay the check could not be implied from these facts. It was said by Lord DENMAN, that the holder ought to have given distinct notice, whether he presented it as a check to be paid, or to be merely placed to his account like other securities. In the absence of such statement, the inference was that the check was received in the latter character. The case is founded on that of *Kilsby v. Williams*, 5 B. & Ald. 815, in which a banker receiving a check of which he was drawee from a customer who did not expressly demand payment, seems to have been regarded as the agent of the customer for the collection of the check, and bound only to the duties of such agent. It is obvious, the facts of this case very materially vary from the facts of either of these cases. There is here an entry of the check on the pass-book

of the depositor, not materially different, it may be fairly inferred, from that which would have been made, if he had demanded the money on the check, and it had been paid to him, and he had handed it back to the cashier with the request that it be entered to his credit as a deposit ; an entry which would not have been made, if the check had been received as a mere security to be converted into money by collection or otherwise. The check was defaced, and made to bear marks of cancellation, by being placed on the file with checks which were paid and were to be charged to the drawers, and it was on the books of the bank credited to the holder, and debited to the drawers. These facts, taken in connection with the fact, that the bank did not in its usual course of business receive for collection checks of which it was the drawee, distinguish this case from the cases of *Boyd v. Emerson, supra*, and of *Kilsby v. Williams, supra*. They are evidence of a complete, executed transaction, by which the check was paid, Hudson, Kennedy & Co. ceasing to be the debtor of the appellee, and the bank becoming his debtor. It is difficult to discover in the transaction any element of agency ; or any fact indicating any purpose on the part of the appellee to create, or on the part of the bank to enter into that relation. The check was not treated by the bank as it would have treated a check of which some other bank or banker was the drawee, and in reference to which it would assume no other duty than that of collection, transferring to the credit of the holder only what may have been derived from it. The mode of dealing with it is just that which would have been adopted if it had not been an over-draft — if there had been funds in the possession of the bank, which were applicable to its payment. Contracts, agreements, transactions between parties should have operation and effect according to their intention, and it seems impossible from these facts to attribute any other intention to the parties, than that the check should be received by the appellant and placed to the credit of the appellee as cash, as money deposited by him. There can be no doubt that he was at liberty to draw for the amount of the check as money on deposit with the appellant, at any time before he was notified that liability for it was disavowed and that his drafts in consequence would not be honored. Nor is there any room for doubt, that at any time during business hours of the day of the deposit, his check would have been honored by the appellant upon the faith of the deposit as money to his credit.

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The case more nearly resembles and falls directly within the principle stated in *Bolton v. Richard*, 6 T. R. 139, that when a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith upon the part of the depositor, the act of crediting is equivalent to a payment in money. Nor can the bank recall or repudiate the payment because upon an examination of the accounts of the drawer, it is ascertained that he was without funds to meet the check, though when the payment was made the officer making it labored under the mistake that there were funds sufficient. *Chambers v. Miller*, 13 C. B. (N. S.), 125; *Levy v. U. S. Bank*, 4 Dall. 234; *Oddie v. National Bank*, 45 N. Y. 735; s. c., 6 Am. Rep. 160; *National Bank v. Burkhardt*, 100 U. S. 686. In the case last cited it was said: "When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned." And in *Oddie v. National Bank*, *supra*, it was said by CHURCH, C. J.: "When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*, 9 N. Y. 463, but if it accepts such a check and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine." And further it was said: "The bank always has the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise. If there has ever been any doubt upon this point, there should be none hereafter."

The Supreme Court of California, in *National Gold Bank and Trust Co. v. McDonald*, 51 Cal. 64; s. c., 21 Am. Rep. 697, dis-

sent from the conclusions of CHURCH, C. J., in *Oddie v. National Bank, supra*, and lay down the rule that when a check on the same bank is presented by a depositor with his pass-book, to the receiving teller, who merely receives the check and notes it in the pass-book, nothing more being said or done, this does not of itself raise a presumption that the check was received as cash, or otherwise than for collection. The case is variant from this case, in the absence of the material facts, that it was without the ordinary course of the business of the bank to receive for collection checks of which it was the drawee, and the entry of the check on the books of the bank, as a debit to the drawer, and a credit to the holder. It is the intention of the parties which must govern, and no intention can be presumed for, nor imputed to them, which is inconsistent with their acts and declarations, and the usual, understood course of the business they are transacting. And when as in this case, there is such a concurrence of facts pointing wholly to the creation presently of an unconditional engagement, and of the relation of debtor and creditor, there can be no authority for a presumption of law, which would change the engagement into one dependent on conditions, and the relation into that of mere principal and agent.

The bank could have received the check conditionally, and have come under obligations to account to the holder for it, only in the event that on an examination of the accounts of the drawers, it was found they had funds to meet it; or in the event that they provided funds for its payment. Or it could have asked for time to examine the accounts, that it might determine whether it would accept and pay, or dishonor the check. It would have been within the option of the holder, to have accepted or rejected either of these propositions. But when the holder presented the check with his pass-book, that the check might be entered as a deposit to his credit, it was a request for the payment of the check; and as was in effect said in *Levy v. U. S. Bank, supra*, there can be no distinction between a request for payment in money, and a request for payment by a transfer to the credit of the holder. The making of any such distinction would be as impolitic on the part of the bank as it would be unjust toward the individual, who accepts the credit instead of his money. It is not very material in what form a bank manifests its acceptance of a check drawn upon it. Whatever may be clearly intended by it as an acceptance, and is received by the holder as sufficient, ought not to be repudiated

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in courts of justice. The acceptance by which we mean an acknowledgment that the check is good, is as clearly manifested by a transfer of it to the credit of the holder, as it would be by noting or certifying it as good, when he may desire to use it in other transactions with strangers. It is not of importance that the transfer is shown only by an entry on the pass-book of the holder. There must be an interval during which that entry will be the only written evidence of the acceptance. The length of that interval depends wholly on the usages founded on the convenience, and the care and diligence of the officers of the bank in making entries on its own books. The entry on the pass-book of the holder is the evidence usually given him for his own purposes, in the ordinary course of business to which he can resort to ascertain the state of his accounts — the indebtedness of the bank to him. The bank preserving for itself evidence of its transactions and liabilities, may and will cause entries to be made on its own books. These, after acceptance of the check has been manifested by an entry to the credit of the holder on his pass-book, are no more than memoranda of a past completed transaction. If there was no other evidence than such as is recited in the instructions we are considering, there would not be a presumption that the bank received the check for collection only, and in the capacity of agent for the holder. The presumption is of payment of the check by the bank voluntarily becoming the debtor of the depositor, taking upon itself the risk of securing it from the drawers. The *onus* of removing that presumption rested upon the bank. And it could be removed only by evidence that such was not the intention, derived from the course of business with the depositor, or from contemporaneous acts or declarations.

If when a check is drawn, the drawer is without funds in bank to meet it, or subsequently he withdraws them, the failure or delay of the holder to make demand of payment, and give notice of dishonor is excused, for the drawer can suffer no injury from the failure or delay. 2 Dan. Neg. Inst., § 1596. The check is a representation to the payee, that there are funds in bank with which it will be paid: and if the representation is false, a fraud is committed upon the payee who innocently acts upon it. It may also be a fraud upon the bank, whose officers, confiding in the good faith of the drawer, may without any examination of his accounts be lured into its payment. It is sometimes stated very broadly, that

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it is fraud absolutely as to the bank, for a customer to draw upon it, when he knows he has not funds to meet his draft. Bad as the usage of banks may be, to tolerate or to authorize over-drafts, it cannot be doubted that they may tolerate or authorize them; and that they are often employed as a means of making loans. It is a harsh judgment to pronounce without regard to the relations and course of business between the bank and the drawer, that an over-draft is a fraud even on the payee—it cannot be a fraud on the bank if the course of business with the drawer was such as to have authorized it. In *Morse on Banking*, 253, it is said: “It is a fraud on the part of holder or payee of a check, to present it for payment, either at the counter to be cashed or through the clearing house by depositing it in his own bank, provided he knows at the time that the drawer has not to his credit in the bank on which it is drawn, any funds, or not sufficient funds to meet it. The holder has no right to attempt to mislead the drawer’s bank into erroneously honoring the check, and then to keep the money if his ruse is successful. Under such circumstances the mistake of the bank will be revocable at any time after the completion of the transaction; and it may, if need be, recover the amount of the wrong payment in a suit directly against the payee.” The authority referred to in support of the proposition is *Martin v. Morgan*, Gow, 123, also reported in 3 J. B. Moore, 635. In that case the holder of the check knew it was post-dated, and that the drawers were insolvent, presented it and received payment from the bankers on whom it was drawn, and to whom these facts were unknown. The post-dating of the check was illegal, and if the bankers had paid it with knowledge of the fact, they would have been subject to a penalty of £100. The holder was not only aware of these facts but was also aware that there were not funds in the hands of the bankers to meet it, and that none would be provided. It was a clear case, not only of ignorance of facts on the part of the bankers, but of fraudulent concealment of facts by the holder. We have been referred to the case of *Peterson v. Union National Bank*, 52 Penn. St. 206, as supporting the proposition as stated in *Morse on Banking*, *supra*, in which *STRONG, J.*, said: “The drawing of a check upon a bank in which the drawer has no funds and uttering it is a fraud. It amounts to a false affirmation, that the money is there to meet it. Hence it is a deceit practiced upon any person to whom the check may be negotiated, and equally upon the bank upon which it may

be drawn. It is manifestly impossible for the officers of a bank to keep ever in memory the state of each depositor's account. To a certain extent, confidence is reposed in the depositor, that he will not present for payment a check which he has not provided funds to meet, and the abuse of that confidence is dishonest. It is not easy to see how it is less dishonest in the holder of a check drawn by another to present it for payment, when he knows the drawer has no funds in bank to meet it. His knowledge makes him a party to the fraud of the drawer and he becomes a willing assistant therein." Before presenting the check and receiving credit for it, the depositor in that case had been informed by one of the drawers that there were no funds to meet it, and knew the other drawer had absconded with a large amount of the funds of the firm, rendering it certain the check could not be made good by them.

Good faith is an essential element of all commercial dealings and should be vigorously exacted. Without intending to adopt, in the general terms in which it is expressed, the proposition laid down in *Morse on Banking, supra*, or in *Peterson v. Union National Bank, supra*, we are of the opinion, that if the holder of a check has full knowledge that the drawer is without funds in bank to meet it, and has no just reason to believe that the check will be honored in the absence of funds, he is wanting in good faith, if he demands and receives payment, especially if it is known to him that the drawer is insolvent, and the bank is ignorant of the insolvency. If we were to concede the proposition, in the broadest terms in which it is stated, knowledge of the want of funds must be traced to the holder. It is fraud which is imputed to him, and the *scienter* should be clearly proved. The inquiry may, as in other inquiries involving fraud, authorize a large latitude in the admission of evidence. The relations between the holder and the drawer of the check become matter of pertinent inquiry. Such relations, however intimate, unless connected with some inculpatory facts and circumstances, cannot justify the imputation of fraud. Nor can it be a just inference from such relations, that one party claiming a benefit under a contract with the other has knowledge of every infirmative fact, which may render that contract of injury to others, if they act upon it. It was only upon the business relations existing between the holder and drawers of the check, that it was proposed to found the inference that the holder knew the drawers were without funds to meet it. If this inference could be drawn, knowledge

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of all the dealings of the drawers in their business as cotton factors could be imputed to the holder of the check. The burden of proving the knowledge of the holder rests upon the bank; and while it may be proved by circumstances, the circumstances must of themselves furnish a reasonable presumption or inference of it. The instructions requested upon this point were properly refused for the want of evidence to support them, and if they had been given would probably have misled the jury, as they would certainly have directed their attention from the legitimate points of inquiry.

The only mistake in the transaction was that of the cashier, who saw fit, though he had at hand the means of informing himself, to pay the check without an examination of the accounts of the drawers. There was no mistake as between the holder of the check and the bank. The one demanded, and the other made payment. It may be, if the cashier had examined the state of the accounts of the drawer, the payment would not have been made. But he chose not to make the examination, he waived all inquiry. Laches are not mistakes, nor can they be confounded. *Chambers v. Miller*, 13 C. B. (N. S.) 125; *Boylston National Bank v. Richardson*, 287; *Hull v. State Bank*, Dudley (S. C.), 259.

We have considered the rulings of the City Court to which exceptions were reserved, and find in them no error prejudicial to the appellant. *Affirmed.*

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(68 Ala. 280.)

Water and water-courses — surface water.

The owner of lands may drain them by ditches, although he thereby precipitates the water more rapidly and in greater volume upon the land of an adjoining owner, provided he acts with a prudent regard for his welfare; but he may not turn water upon such adjoining lands which would not otherwise have flowed there.*

ACTION of damages for overflowing lands. The opinion states the facts. The plaintiff had judgment below.

* See *Barkley v. Wilcox* (88 N. Y. 140), 40 Am. Rep. 519.

Porter & Martin, for appellant.

Hewitt & Walker, contra.

STONE, J. That exemplary damages, or smart money, can be recovered in such an action as this, is settled in this State. *S. & N. Railroad v. McLendon*, 63 Ala. 266; *Phil. Wil. & Balt. R. Co. v. Quigley*, 21 How. 202.

The limitation of actions of this kind is one year, and there can be no recovery for injury sustained after the commencement of the suit. *Roundtree v. Brantley*, 34 Ala. 544; *Polly v. McCall*, 37 id. 20.

The bill of exceptions states that it contains all the evidence, and nothing is said in it of any permanent or lasting injury to the freehold. No proof that the injury complained of caused any deposit on plaintiffs' land, or that the increased flow of the water caused any of the soil of the lands to be washed away. Hence we are not able to perceive on what ground any question could have arisen on the subject of permanent injury. From all that appears before us, if the ditches on defendant's lands were filled up, and the earth restored to the condition it was in before the excavation, the injury the plaintiffs complain of would cease. Our rulings hereafter announced will rest on the absence of proof of permanent injury.

The surface of the earth is everywhere uneven, producing inequality of elevation. Water seeks its level, and flows naturally from a higher to a lower plane. These differences of elevation are sometimes characterized as superior and inferior heritages. The inferior heritage, or lower surface, is doomed by nature to bear a servitude to the superior in this, that it must receive the water that falls on, and flows from the latter. The inferior cannot complain of this, for *aqua currit et debet currere ut solebat*. The proprietor of the superior heritage cannot, by artificial means, cause water to flow on the inferior, which had theretofore flowed in a different direction; neither can the owner of the inferior heritage, by dam or levee, obstruct the natural flow of the water, and cause it to flow back, or stand on the lands of the superior. *Sic utere tuo ut alienum non laedas*, is the maxim, the rule in such case. See *Stein v. Burden*, 29 Ala. 127. So, as a rule, every one must so enjoy his own property, as not to offend his neighbor's equal right to enjoy

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his own unmolested. But this rule cannot be enforced in its strict letter, without impeding rightful progress, and without hindering industrial enterprise. Hence minor individual interest is sometimes made to yield to a larger and paramount good. To deny this principle would be to withhold from the world the inestimable benefits of discovery and progress in all the great enterprises of life. The rough outline of natural right, or natural liberty, must submit to the chisel of the mason, that it may enter symmetrically into the social structure.

As we understand the facts of this case, the plaintiffs and the defendant were coterminous landholders, each engaged in agriculture; the former owning the inferior, and the latter the superior heritage. Through the lands of the plaintiffs, and near the dividing line, flowed a natural stream or branch, which was the natural outlet for a part, at least, of the water which fell on defendant's land. The water flowed naturally from the defendant's land upon the lands of plaintiffs, and across a portion of it into the running stream. It flowed slowly, not in a collected body, but scattered over the surface. In its natural state, part of this water was absorbed, and part evaporated before it reached the lands of plaintiffs. By means of ditches, defendant collected all this surface water into one channel, thereby draining his own lands, and causing the water to flow much more rapidly, and in one body, into the branch on plaintiff's land. This emptied the water off defendant's land much sooner, and as a consequence, precipitated it much more rapidly, and in increased volume, on the lands of plaintiffs, thereby flooding a portion of his lands and rendering them uncultivable. We have then the case where plaintiffs must submit to an inconvenience and injury, or defendant must forego a beneficial improvement. What is the rule? Much has been said and written on this subject, and there is a want of harmony in the decisions on this, as on many other questions which have come before the courts. Among the many discussions of this question, we approve and adopt as our own the language of WOODWARD, J., in *Kauffman v. Griesemer*, 26 Penn. St. 407. He said: "Almost the whole law of water-courses is founded on the maxim of the common law, *aqua currit et debet currere*. Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or flow or fall upon the superior. * * * This easement

is called a servitude in the Roman law, and consists in the subjection of the inferior heritage towards those whose lands are more elevated to receive the waters which flow from them naturally. * * * This obligation applies only to waters which flow naturally, without any act of man. Those which come either from springs, or from rain falling directly on the heritage, or even by the effect of the natural disposition of the places, are the only ones to which this expression of the law can be applied. It is not however to be understood, that because the flow of water must not be caused by the act of man, that therefore the proprietor who transmits water to the inferior heritage, is not permitted to do any thing on his own land — that he is condemned to abandon it to perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water. The law intends not this. It prohibits only the immission into the inferior heritage of the waters which would never have fallen there by the disposition of the places alone. It never would nor could refuse to the superior proprietor the right to aid and direct the natural flow. Hence, for the sake of agriculture — *agricolendi causa* — a man may drain his ground which is too moist, and discharging the water according to its natural channel, may cover up and conceal the drains through his lands — may use running streams to irrigate his fields, though he thereby diminishes not unreasonably the supply of his neighbor below — and may clear out impediments in the natural channel of his streams, though the flow of water upon his neighbor be thereby increased. * * * It is not more agreeable to the laws of nature that water should descend, than it is that lands should be farmed and mined; but in many cases they cannot be if an increased volume of water may not be discharged through natural channels and outlets. The principle therefore is to be maintained; but it should be prudently applied. * * * The plaintiffs had no right to insist upon his receiving waters which nature never appointed to flow there." *Martin v. Riddle*, 26 Penn. St. 415; Ang. on Water Courses (7th ed.), §§ 108a to 108s; *Waffle v. N. Y. Central R. Co.*, 53 N. Y. 11; *Williams v. Gale*, 3 H. & Johns. 234; *Prescott v. Williams*, 5 Metc. (Mass.) 429; 29 Am. Dec. 688.

Under these rules, defendant had no right, by ditches or otherwise, to cause water to flow on the lands of plaintiffs, which, in the absence of such ditches, would have flowed in a different direction.

As to the water theretofore accustomed to flow on the lands of the plaintiffs, defendant was not bound to remain inactive. He was permitted to so ditch his own lands as to drain them, provided he did so with a prudent regard to the welfare of his neighbor, and provided he did no more than concentrate the water, and cause it to flow more rapidly, and in greater volume on the inferior heritage. This however must be weighed and decided with a proper reference to the value and necessity of the improvement to the superior heritage, contrasted with the injury to the inferior; and even this license must be conceded with great caution and prudence. It is a question for the jury to determine, on the facts of each particular case, under proper instructions from the court.

Applying these principles to the charges asked by defendant and refused, the first charge was calculated to mislead, because its tendency was and is to deny to plaintiffs the right to recover exemplary damages. If malice, vexation, or wantonness on the part of defendant was shown, the jury would be authorized to go beyond the actual injury to the land. The second charge should have been given. The third charge was rightfully refused, for two reasons; its tendency was to require a too strict and severe rule for the separation of the damages accruing within the twelve months, from those suffered before that time. Much latitude and discretion are allowed to juries in such inquiries. And in any event, on the hypothesis of this charge, the jury would be authorized to award nominal damages. *Stein v. Burden*, 24 Ala, 130. The fourth and fifth charges assert the same legal proposition as the third, and were rightly refused. The sixth charge is an argument, and not in proper form for instructions to a jury. Charges to juries should be made up of clear and distinct legal principles, without involvement, and free from redundant verbiage, or other confusing elements. The introductory part of the seventh charge is an argument, and it was rightly refused on that account. The principle of the charge is objectionable, in this, that it does not limit and qualify the right to precipitate the flow of water on the servient or inferior heritage, as declared above in this opinion. The eighth charge was rightly refused.

Reversed and remanded.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

BORLAND V. BARRETT.

(78 Va. 123.)

Damages — exemplary — in assault and battery.

Exemplary damages may be proper in a case of assault and battery, although no actual malice is shown.*

ACTION of assault and battery. The opinion states the point. The plaintiff had judgment below.

T. R. Borland and Godwin & Crocker, for appellant.

Burroughs & Bro., for appellee.

STAPLES, J. This was an action of trespass, assault and battery, brought in the corporation court of Norfolk city. The case was tried by jury, who rendered a verdict of \$1,000 damages in favor of the plaintiff. This verdict was affirmed by the court, and judgment given against the defendant, who applied for and obtained a

* See, *contra*, *Huber v. Teuber* (3 Mac Arth. 434), 36 Am. Rep. 110.

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writ of error and *supersedeas* from one of the judges of this court.

In order to understand the errors relied upon to reverse this judgment, it is necessary simply to allude to some of the evidence adduced on the trial. It appears that the defendant and his wife, in the year 1878, were boarders at the Atlantic Hotel, in the city of Norfolk. In the summer of that year they went to the mountains, and did not return until the fall season. Upon leaving the hotel, he, defendant, did not reserve the seats usually occupied by himself and wife at one of the tables in the dining-room, and according to the rules of the hotel, these seats were free to be assigned to any other persons. In July, 1878, the plaintiff became a boarder at the hotel, and the seat which had been formerly occupied by the wife of the defendant was assigned to the plaintiff, and was occupied by him without interruption and without question during the summer and fall months. Upon his return to the hotel however the defendant claimed the seat, and demanded through the head-waiter in the dining-room it should be vacated in behalf of his wife.

The plaintiff, it seems, was not informed of the previous occupation of the seat by the defendant's wife or of any of the circumstances connected with it, and when asked by the head waiter if he would change, declined to do so. The defendant, according to his own statement, was not aware that the seat had during his absence been assigned to the plaintiff. When therefore he saw the latter occupying the seat at the table, he took him to be some transient guest who had just arrived by one of the trains, and he requested the plaintiff to take the next seat and give his wife her seat. The plaintiff replied that it was his seat; that he had had it since July, and he preferred to retain it. The defendant said that if time were to be counted, his wife had occupied the seat the winter before. This was the entire conversation which passed between the parties at that time. The defendant further states, he did not see the plaintiff again till the morning of the difficulty, when approaching the breakfast table he saw the plaintiff in the seat. He said to the plaintiff: "I see you have my wife's seat again. Will you please move to the next seat and give her seat to her?" He looked up to me in a threatening manner and said, 'No.' I saw there was going to be a difficulty, and I concluded at once I had better strike the first blow, and I seized a Worcestershire sauce bottle and struck him over the head with it. He immediately

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arose from his seat, and and seizing a plate with both his hands, lifted it in the act to strike me. I seized a chair, and raised it, when parties interfered, and that ended the matter."

This is the defendant's account of the transaction. According to other testimony in the cause, the assault was a very violent one, one of the witnesses describing it as "a very ugly scene."

The bottle was broken by the blow and the plaintiff was led bleeding from the dining-room. The defendant's version of the affair has been given because he is entitled to the benefit of it, in considering the instructions asked for by his counsel. Upon his own showing the attack was without a circumstance of justification.

The plaintiff looked at him in a threatening manner, as he supposed. He saw there was going to be a difficulty, and concluded he would strike first. This is his sole excuse. He asked no explanation, he gave none. He had no sort of claim to the seat, as he ought to have known. He was utterly in the wrong in every particular. Carried away by his angry passions, he made a wanton and unprovoked attack on the plaintiff, forcing him to submit to the humiliation of receiving in public a gross insult and indignity, or having an affray which might have endangered the lives or the safety of the guests of the hotel.

What is here said is intended to apply for the motion for a new trial on the ground of excessive damages; but in this connection, more particularly to the instruction asked for by the defendant. That instruction is as follows:

"The court instructs the jury that if they believe from the evidence that the defendant, in the assault made upon the plaintiff, was actuated by no motive of malice or deliberate design to injure, but acted under the heat of blood and the impulse of the moment, the measure of damages is compensatory and not vindictive, and that he, defendant, is only liable to such damages as result from loss of time and labor, expenses of medical services, bodily pain and suffering, and diminished capacity to work, consequent upon the injury."

This instruction was refused, and we are now to consider whether the court erred in so doing.

It will be perceived that the instruction assumes that to warrant a verdict for exemplary damages, the jury must be satisfied that the assailant was actuated by malicious motives in making the as-

sault, or that he had a deliberate design to injure the plaintiff. In the first place, the proposition, as asserted, was well calculated to mislead the jury; for in a legal sense, every unlawful act done willfully or purposely to the injury of another, upon slight provocation, is as against such person malicious, and the law so presumes. And if it be conceded that the defendant may by testimony rebut this presumption, still in this case there is not a scintilla of evidence even tending to show the absence of the malicious motive which the law infers from a wanton and unprovoked assault. And this court has again and again declared that the trying court is not warranted in giving an instruction when there is no evidence to sustain it.

It may be true that the defendant acted in the heat of blood; it was however "heat of blood" without justification or excuse. The violent assault made by him was altogether disproportioned to the supposed provocation. No man wantonly striking another with a weapon calculated to inflict damage can be heard to say that his purpose was not to injure, and an instruction based upon that hypothesis would be well calculated to mislead the jury.

It is to be further observed the right to recover exemplary damages is not confined to cases of actual malice. Whenever the assault is of a grievous or wanton nature, manifesting a willful disregard of the rights of others, actual malice need not be shown to entitle the aggrieved party to exemplary damages. Whilst therefore the existence of malice may be shown in aggravation of such damages, its absence does not defeat the right to their recovery. 2 Sedg. Meas. Dam. 26, 28; on Torts, 227.

The instruction however asserts that if the defendant had neither malice nor deliberate purpose to injure, the measure of damages is compensatory and not vindictive, and the defendant is bound only for such damages as result from loss of time and labor, expense of medical services, and bodily pain and suffering, and diminished capacity to work consequent upon the injury.

It will be perceived the instruction ignores the right of the plaintiff to reparation for the indignity and insult to his feelings which may have resulted from the time and manner of the attack. In *Merest v. Harvey*, 5 Taunt. 442, it appeared that whilst the plaintiff was shooting on his own estate the defendant forced himself on the premises and used very insulting language. The jury found a verdict for £500 damages. Upon a motion for a new trial,

GIBBS, C. J., said: "I wish to know in a case where a man disregards every principle which actuates a gentleman, what is to restrain him except damages? Suppose a gentleman had provided a walk in his paddock before his window, and that a man intrudes and walks up and down before the window of his house, and looks in whilst the owner is at his dinner, is the trespasser to be permitted to say: 'There is a half a penny for you which is the full extent of all the mischief I have done?' Would that be a compensation? I cannot say that it would be."

The learned chief-justice then mentioned a case where the jury gave £500 damages for merely knocking a man's hat off, and the court refused a new trial. In *Sullidge v. Wade*, 8 Wile. 18, BATHURST, J., said: "In actions for assaults and the like, the circumstances of the time and place, when and where the insult is given, require different damages, as it is a greater insult to be beaten upon the Royal exchange than in a private room." And even Mr. Greenleaf, who has universally opposed the doctrine of vindictive or punitive damages, concedes, in actions of tort, the jury are not confined to the actual pecuniary damage sustained by the plaintiff, but may take into consideration the motive of the defendant, the insulting character of his assault, and all the circumstances of aggravation and outrage attending the act. 2 Greenl. Ev., § 82.

Such damages, although sometimes denominated vindictive, are in their nature compensatory as much as those given for bodily pain, loss of time, and expense incurred. The modern authorities go further and hold where elements of malice enter into the commission of the offense, the jury may give not only such damages as they think necessary to compensate the plaintiff, but also such as will operate as a punishment to the defendant, and tend to deter him and others in like cases from similar outrages. Fuller Dam. 615; 2 Sedg. Meas. Dam. 324, notes.

This doctrine, though questioned by judges and writers, seems to be too firmly settled by a long train of cases to be now called in question. It is perhaps needless to remark that the instruction asked for by the defendant is in conflict with the views here presented, and was therefore properly refused by the court.

It has been said however that if the instruction was erroneous, the court ought to have modified it and granted it as modified. It has been held in a number of cases where the refusal to give an instruction as asked for is calculated to mislead the jury, it is the

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duty of the court to correct it and give it in its corrected form. It is equally true however that the rule in question cannot impose upon the court the duty of modifying or correcting every erroneous instruction which may be asked. As the general rule, if the instruction does not correctly expound the law, the court may refuse to give it, and is under no obligation to give any other instruction in its place. *Rosenbaum v. Weeder*, 18 Gratt. 785, 799. The instruction asked for by defendant's counsel did not admit of any modification. As has been already seen, it was fundamentally erroneous in the doctrines asserted, and was therefore very properly unconditionally rejected.

The court however did say to the jury, after refusing the defendant's instruction, "that the whole question and scope of damages were for the jury alone to determine." We think that in this there was no error. We do not mean to say that in every case the jury may fix a measure of recovery without reference to the opinion of the court. On the contrary it is the province and duty of the judge if required to expound the law by which the jury are to be governed in framing their verdict.

In this case however had the court undertaken to lay down any specific rule it must have said: the jury were authorized to give vindictive damages, taking into consideration all the circumstances of insult and aggravation attending the case.

And such was the effect of the declaration of the court to the jury, and was no doubt so understood by them. If it be admitted that the court might and ought to have gone further in defining the elements which constitute the measure of recovery, the failure so to do will not constitute such error as would warrant this court in setting aside a just and proper verdict.

[Omitting minor points.]

Upon the whole case we are of opinion the judgment of the corporation court is correct, and should be affirmed.

Judgment affirmed.

HAWKINS V. GARLAND'S ADMINISTRATOR.

(78 Va. 149.)

Will — parol evidence to explain.

A testator made a bequest to his namesake, "S. G., son of Captain J. F. S." Held, that evidence was admissible that there was no person answering the description, and that the testator intended S. G., son of Captain J. F. H.*

THE opinion shows the case.

L. D. Haymond, and J. B. Brockenbrough, for appellant.

Jubal A. Early, for appellees.

CHRISTIAN, J. This case is before us on appeal from a decree of the Circuit Court of the city of Lynchburg.

The facts disclosed by the record, so far as necessary to be noticed in this opinion, are as follows:

Samuel Garland, Sr., departed this life in November, 1861. He left a will written wholly by himself, which bears date the 7th of December, 1857. He left a very large estate valued at nearly \$800,000. He left a widow but no issue. His next of kin consisted of a number of nephews and nieces, to all of whom he left liberal bequests.

The question in this case arises under the fifteenth clause of said will, which in its numerous provisions is the only one necessary to be noticed in deciding the controversy in the court below, and which is now brought before this court for review. That clause of the will is in these words: "15th. I give to each of my name-sakes, Samuel G. Slaughter, son of Ch. R. Slaughter; Samuel G. White, son of Samuel G. White; Samuel, son of S. Garland, Jr., and Samuel G., son of Captain John F. Slaughter, a bond of one thousand dollars of S. S. railroad."

The record further conclusively shows that at the date of the will, to wit, the 7th of December, 1857 there was no such person in existence as "Samuel G. Slaughter, son of Captain John F.

* See *Merrick v. Merrick* (87 Ohio St. 126), 41 Am. Rep. 498; *Judy v. Gilbert* (71 Ind. 96), 40 Am. Rep. 399.

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Slaughter," and no such person was in existence until three or four years after the date of said will. Then there was born to John F. Slaughter a son whom he named Samuel G. Slaughter.

The proof in the cause further shows conclusively that John F. Slaughter never was known to the testator, or called by him "Captain" John F. Slaughter, and that he had no such title, and was known and called by the testator simply Jack Slaughter. He had no such title as captain, was never known or called as such either by the testator or any other person, and at the date of the will he had no son named "Samuel G. Slaughter."

All this is admitted by the answer of John F. Slaughter.

Without going further into the proofs in the cause it is manifest that there was a misdescription of the person named in the fifteenth clause of the will as a legatee of the bond of \$1,000 in the said clause mentioned.

The legacy is to a name-sake. That name-sake is described as Samuel G., son of Capt. John F. Slaughter. There was no such name-sake in existence at the time of the execution of the will. There was no such person known to the testator as Capt. John F. Slaughter, and John F. Slaughter, whatever his title, had no such son, and did not for years afterward have a son named after the testator, Samuel Garland.

The case presented upon these facts is one of a latent ambiguity within the very definition of the authorities.

As defined by Lord Bacon, "a latent ambiguity is that which seemeth certain and without ambiguity for any thing that appeareth on the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity." See Bacon Law Torts, 99.

A latent ambiguity therefore exists in a sentence or expression only when the real meaning or intention of the writer is hidden or concealed. It does not appear on the face of the words used, nor is its existence known until those words are brought into contact with collateral facts. It is only when you come to apply the words bringing them alongside the facts which existed when used, and to read them in the exact light in which they were written that you make up the latent ambiguity, if one exists. Bacon Max. 23; Greenl. Ev., §§ 297, 298; Brown Leg. Max. 441.

The case before us therefore is one of latent ambiguity where there is nothing ambiguous in the words used, but where the ex-

traneous evidence shows that the person named in the testator's will as the object of the testator's bounty, is not in fact the person to whom the testator intended to make the bequest. It was simply a misdescription of that person, made inadvertently by a slip of the pen in writing the name and designation. This is the more manifest when it appears that in the testator's will he made another mistake as to the name designating the object of his bounty, and no controversy is made with respect to the mistake of the name in that case, where he designates the legatee as Samuel Garland, brother of Ch. R. Slaughter, when it seems manifest he meant to write Samuel Slaughter. See 14th clause of will.

Where there is a misdescription in a will, either of the person to whom the devise or legacy is given, or of the subject-matter of the bequest or devise, extraneous evidence is always admissible to show the person who was the object of the testator's bounty, or the property actually devised or bequeathed. When there is doubt as to whom the legacy or devise was intended, or where there is a misdescription of the property devised or bequeathed, extraneous evidence is always admissible to show the real party to whom the devise or bequest is made, and the specific property which the testator intended to devise or bequeath. This is familiar law, and sustained by all the authorities.

I think it must be conceded that the extraneous evidence clearly shows that in the testator's will there was a misdescription of the legatee, one of the subjects of his bounty, when he designates him as "Samuel G., son of Captain John F. Slaughter," and especially when he designates him as one of his name-sakes. As already seen, there was no such person as "Samuel G. Slaughter, son of Captain John F. Slaughter," in existence at the time of the execution of the will. I think therefore that it is perfectly plain from the will and the evidence in the cause that Samuel G. Slaughter is not entitled to receive the legacy of \$1,000, and that he, upon the proofs in the cause, does not answer to the description contained in the 15th clause of the will of the testator.

I think, upon the record, that this is too plain for argument, and the concession in the answer of John F. Slaughter that he did not have any son named after the testator, and not until years after the date of the will, is conclusive of the case in this respect.

The fact that years after the execution of the will he had a son whom he named after the testator does not at all affect the con-

struction of the will. Properly to construe that will, we must put ourselves in the place of the testator and inquire who were the objects of his bounty under the 15th clause of his will. Assuming that position, we are bound to say that the son of John F. Slaughter did not answer to the description of the testator as his name-sake, for he was not then born, and not born until years afterward ; and he was not the son of *Captain* John F. Slaughter, for there was no such person known to the testator. It is very plain therefore that the son of Captain John F. Slaughter is not entitled to receive this legacy for the reasons already stated, there being plainly a misdescription of the person to whom the legacy was given in the 15th clause of said will.

But the main and important question is, to whom shall this legacy be paid ? Shall it lapse because there is no hand to receive it, and no legatee to whom it shall be paid ?

Courts are always averse to permitting a legacy to lapse if it can be found who was the legatee intended by the testator to be the object of his bounty. In this respect, as in all other questions concerning the construction of wills, the prime object is to find out the intention of the testator, and the courts will never permit a legacy to lapse, if upon a fair construction of the will and seeking to carry out the intention of the testator, it can find who was the legatee the testator intended to make the object of his bounty.

In this case it is plain that a latent ambiguity exists and is established by extrinsic evidence. Such ambiguity thus established by evidence *dehors* the will may be removed in the same manner by extrinsic evidence.

I can find no case, English or American, after a careful examination of the authorities, where after a latent ambiguity has been certainly established, evidence was rejected which tended to show the real intention of the testator and which was necessary to carry that intention into effect.

As was said by Lord THURLOW in *Baugh v. Read*, 1 Ves. Jr. 257, " where a testator uses certain words which *prima facie* give a clear account, the same fact that enables you to prove that there was a latent ambiguity enables you to prove also what was his real intention."

In the old case of *Beaumont v. Fell*, 2 P. Wms. 141, which was one of the first cases in which parol evidence was admitted in aid of construction, it was held that whenever the testimony raised an

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ambiguity, evidence *dehors* the will was received to show what the words used really and in fact meant.

This case, often commented upon by the English judges, has never been departed from, but the principle therein declared has been universally recognized. See Jarman on Wills, ch. 14 (3d Am. ed.), and numerous cases there cited; *Good v. Needs*, F. M. & W. 139; *Hiscock v. Hiscock*, 5 M. & W. 863; Wynn, 252, and cases there cited; *Careless v. Careless*, 1 Mer. 384.

In the last-named case it was held that "identification of the devisee is virtually left wholly to parol."

That case is singularly like the one under consideration. The legacy there was to the testator's nephew Robert, the son of Joseph C. The testator had two nephews called Robert, the one the son of his brother John C., the other, the son of his brother Thomas C. The testator had no brother Joseph, nor was there any other Joseph C. This was held by Sir WILLIAM GRANT to be a latent ambiguity, and that the writing of the word Joseph instead of Thomas was a mere slip of the pen. See also in this connection Jarman on Wills, ch. 14 (3d Am. ed.), 361; 2 Taylor on Ev., §§ 1220, 1226; Wigram on Wills, 285-6. See also the leading case of *Hiscock v. Hiscock*, 5 M. & W. 863, in which the principal English cases on the subject are elaborately reviewed by Lord ABINGER, and where it was held that evidence was admissible not for explaining the words or meaning of the will, but either to supply some deficiency or remove some obscurity or ambiguity. Where, for instance, the devise was on the face of it perfect and intelligible, but from some of the circumstances admitted in proof an ambiguity arose as to which of the two or more persons or things the testator intended to express.

The cases in our own court establish the principle settled by the English court that where a latent ambiguity has been established by evidence *dehors* the will, extrinsic evidence may also be received to remove the ambiguity and to show the real intention of the testator.

In *Maund's Adm'r v. McPhail*, 10 Leigh, 199, the testator devised all his negroes "to the agent of The New Colonization Society in Africa." Parol evidence was admitted to show that the society meant was "The American Colonization Society," and that McPhail was the agent of that society, and that he was the person to whom the bequest by the testator was intended to be given. And

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that intention was proved in this case by the declarations of the testator made to a witness, and it was upon this evidence that the legacy was upheld by this court and a decree rendered delivering the slaves to McPhail as the agent of "The American Colonization Society."

In the case of *Roy's Ex'r v. Rowzie*, decided by this court as late as 1874, it was held that a bequest to "The Baptist Theological Seminary in South Carolina," was upon evidence intended by the testatrix to be a bequest to "The Southern Baptist Theological Seminary;" and one of the principles emphatically declared in that case was that "Where the person or object or subject referred to in a bequest is uncertain, or does not answer precisely the description given them in the will, or where there are two or more objects or subjects which answer equally the description, resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used; and if such intention is so ascertained with sufficient certainty, the bequest is valid."

Judge MONCURE, in delivering the unanimous opinion of the court in this case, said: "Parol evidence is always admissible and even necessary to lead us to the person or object and subject referred to in a bequest. The court of construction, with the testator's will in hand, looks for the objects of his bounty and the thing intended to be given, and expects them to answer precisely the terms of description given of them in the will. Generally they do, and there is no difficulty. Often they do not. * * * In such cases resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used; and almost always his intention is thus ascertained with sufficient, if not with unerring certainty. If it cannot be, the bequest must then fail of effect; but the court is always reluctant so to declare. It will not require that the object or subject shall have every ear-mark given to it by the testator. Nay it may in some respects have different ear-marks, and yet the description contained in the bequest may be sufficient to give it effect. *Falso demonstratio non nocet cum de corpore constat*, is a maxim which expresses a rule of construction to which the court has frequent recourse in such cases."

Applying these principles to the case before us, I think it is clear that (there being no such person as Samuel G., son of Captain

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John F. Slaughter, in existence at the time of the execution of the will), the evidence in the cause plainly points to the appellant, Samuel G. Hawkins, as the object of the testator's bounty and the person to whom he intended to give the legacy of \$1,000 by the fifteenth clause of his will.

He was the name-sake of the testator, named Samuel Garland. He was the son of his intimate friend, Capt. John F. Hawkins. He answers to the description in the will as (1) my name-sake, Samuel G.; (2) as the son of Capt. John F.

Now, if the word Hawkins had been written instead of "Slaughter," the appellant would have answered the full description of the person intended as one of his legatees.

It is manifest, from the evidence of the testator's widow and his relative and intimate friend and counsel, Judge Garland — whose evidence we think admissible after the establishment of the latent ambiguity heretofore referred to — that the testator intended to write the words Samuel G., son of Capt. John F. Hawkins, instead of the words Samuel G., son of Capt. John F. Slaughter; and that it was a mere slip of the pen when the word Slaughter was written instead of Hawkins, as in the case of *Careless v. Careless*, *supra*, the word Joseph was said by Sir WILLIAM GRANT to be a slip of the pen for John. The venerable Judge Garland, the intimate friend of the testator, was told by the testator that Capt. John Hawkins had a son named after him, and that he had selected three or four of his name-sakes to whom he had given \$1,000 each, and he is positive that Samuel Garland Hawkins is one of the name-sakes mentioned by him. This is confirmed by the evidence of the widow of Samuel Garland.

The writing of the name of Slaughter instead of Hawkins is the more manifest when it appears that the name of Slaughter occurs seven times in the will of the testator as different devisees and legatees.

And it is a pregnant fact, that except in the fifteenth clause, John F. Slaughter is never spoken of as Capt. John F. Slaughter, nor did the testator in his life-time ever call him by that title. But on the other hand, John F. Hawkins was always known and called by the testator and other persons as "Captain," which was in fact his title.

I am of opinion therefore that inasmuch as at the time of the execution of the will there was no such person in existence as

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"Samuel G., son of Capt. John F. Slaughter," he, it is plain, could not take the legacy. And I think it is equally clear upon the evidence that the person to whom the testator intended to give, and did in fact give, the legacy mentioned in the fifteenth clause of the will was Samuel G., son of Capt. John F. Hawkins, the appellant in this cause, and that the said legacy ought to be decreed to him.

I am therefore of opinion that the decree of the said Circuit Court of Lynchburgh be reversed.

Decree reversed.

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(75 Va. 299.)

Easement — drainage.

A proprietor, owning two estates, Woodlawn and Fairfield, and draining the former by ditches through the latter to a river, granted Woodlawn in 1811 to the plaintiff's grantors, and devised Fairfield in 1830 to the defendant's grantors. The deed and will were silent about draining. When Woodlawn was granted the ditches were open and visible, and had been almost continuously used, they were necessary to the proper enjoyment of the premises, and there was no other way of draining except at large expense. *Held*, that defendant should be enjoined from stopping up the ditches on his own land. (*See note*, p. 169.)

ACTIGN for injunction. The opinion states the facts. The injunction was granted below.

Borroughs & Bro. and *L. D. Starke*, for appellant.

Ellis & Thom, for appellee.

BURKS, J. [Omitting minor matters.] Anthony Walke, Sr., was the owner of two tracts of land, Woodlawn and Fairfield, in the county of Princess Anne. By deed, in November, 1811, he conveyed Woodlawn to his son, Anthony Walke, Jr., and in 1816 by his will he devised the other tract, Fairfield, to his son David M. Walke, with a contingent limitation to the children (except the said Anthony) of the grantor. The appellant Sanderlin,

claims title to Fairfield under this devise and subsequent conveyances. At the date of the conveyance of Woodlawn the two farms were as they are now, separated by a public road. Topographically, Woodlawn is higher than Fairfield. While Anthony Walke, Sr., was the owner of both farms, several ditches or drains had been cut for some distance on the Woodlawn tract to the intervening road and across it into and through the Fairfield tract, so as to connect with the eastern branch of Elizabeth river. At the time Woodlawn was conveyed as aforesaid, these ditches or drains were open and visible, and were then, as they still are, necessary for the convenient and beneficial use and enjoyment of the Woodlawn tract. They were constructed to carry off the surface water and prevent its accumulation on that farm, and the draining could be effected by no other means at reasonable cost and expense. It seems that after Baxter acquired Woodlawn, he did cut a ditch through his own land to Deep Branch; but this was done to drain the land owned by him and not embraced in the Walke deed, and was closed to protect his crops from the water thrown upon his land by Sanderlin's stopping the ditches before mentioned. The very decided weight of the proof is, that Woodlawn cannot be effectually drained to Deep Branch without a heavy expenditure of money, and that the ditches through Sanderlin's land are essential to the draining. These ditches have been used to drain Woodlawn ever since they were first cut, continuously, with the exception of a short period, until they were obstructed by Sanderlin in 1878, which caused Baxter to file his bill.

Upon these facts, although the right to the use of the ditches as an easement was not given in express terms by the deed of the elder Walke to his son, under whom Baxter claims, yet we are of opinion that it passed with the land granted as an incident.

This doctrine of the grant of an easement by implication, under circumstances such as have been stated, seems now to be well settled. The whole subject has been thoroughly and elaborately considered and discussed in Washburn on Easements, ch. 1, § 3, and the numerous adjudged cases, English and American, carefully collated and examined. We do not propose to go over the cases. "The ground," says the author, "upon which this doctrine both of the French and the common law rests, seems to be, that where the owner of two heritages, or of one heritage consisting of several parts, has arranged and adapted these so that one derives a benefit

or advantage from the other of a continuous and obvious character, and he sells one of them without making mention of those incidental advantages or burdens of one in respect to the other, there is in the silence of the parties an implied understanding and agreement that these advantages and burdens, respectively, shall continue as before the separation of the title." Washburn on Easements, ch. 1, § 3, pp. 54-5.

Having adverted to the rule of the French law, he remarks, that "the same principle has been adopted, by analogy, to a greater or less extent, by different courts, as a basis of construing grants, though it is believed that the common law, in order to give this effect, requires that what is thus claimed as a servitude or easement should be reasonable, and in some cases absolutely necessary as well as continuous and apparent." *Id.*, ch. 1, § 3, pp. 56-7.

Again after citing and giving the substance of many decisions, he says, "although it might perhaps be difficult to embody the leading doctrines of the foregoing cases into any general proposition, it would seem, that in case of a division of an estate, consisting of two or more heritages, whether an ease or convenience which may have been used in favor of one, in or over the other, by the common owner of both, shall become attached to the one or charged upon the other, in the hands of separate owners, by a grant of one or both of those parts, or upon a partition thereof, must depend, where there are no words limiting or defining what is intended to be embraced in such deed or partition, upon whether such easement is necessary for the reasonable enjoyment of the part of such heritage as claims it as an appurtenance. It must be reasonably necessary to the enjoyment of the part which claims it, and where that is not the case, it requires descriptive words of grant or reservation in the deed, to create an easement in favor of one part of a heritage over another." *Id.*, ch. 1, § 3, pp. 88-9.

These principles were recognized by this court in *Scott v. Beutel*, 23 Gratt. 1; and *Hardy v. McCullough*, *id.* 251. And in the latter case Judge BOULDIN, after quoting from the opinion of the court delivered by Judge CHRISTIAN in the former case, observes "that the question whether an easement or servitude will be created, or pass as an incident to or part of the property granted, is a matter of contract, and must, of course, depend on the intention of the parties, as expressed in the contract. If thus expressed, the terms of the contract must control its construction. When not thus ex-

pressed, the construction will be controlled by the use and condition of the property at the time of the sale, and certain implications and presumptions of law arising thereon." See also *Burwell v. Hobson*, 12 Gratt. 322.

In the present case, the easement was *apparent, continuous* and *necessary*, as we think, and in our opinion, passed as an incident of the grant under the deed of November, 1811.

It is clearly established, that the obstruction of the ditches would cause a large accumulation of water upon Baxter's land near his residence, which would of necessity become stagnant, and thus not only seriously impair the value of the land, but in the opinion of the medical witnesses would in that malarial country produce disease.

Sanderlin commenced the obstruction, and was restrained by injunction, and the only remaining question is, whether a bill would lie in such a case. We have no doubt that it would. Where easements or servitudes, says Mr. Justice Story, are annexed by grant, or covenant, or otherwise, to private estates, the due enjoyment of them will be protected against encroachments by injunction. 2 Story Eq. Jur., § 927. Baxter has a remedy by action at law, but it is inadequate. Damages in repeated suits would not compensate in such a case. The injury is irreparable, and calls for a preventive remedy such as a court of equity only can furnish. That court constantly interposes by injunction, where the injury is of that character. "By the term 'irreparable injury,'" says a learned author, "it is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages." Kerr on Injunctions, ch. 15, § 1, p. 199.

The injury to Baxter's land would be "material," and disease and death merely would be "grievous." For such injuries there could be no just compensation in dollars and cents.

Ordinarily, where the existence of a nuisance (and in a general sense every violation of an easement may be considered a nuisance, High on Injunctions, ch. 12, § 544) is controverted, the party seeking the interference of a court of equity will generally be required first to establish his right at law. But it is said that in cases (like the present) where the plaintiff has been long in the exercise of his right, or where delay would be disastrous, the court will not require the right to be first established at law. 2 Story's Eq. Jur. (11th

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ed.), § 925 f. and cases cited in note. See also what is said by Judge Staples in *Manchester Cotton Mills v. Town of Manchester*, 25 Gratt. 831, 832. An issue to try the right was not regarded as indispensable in *Pruner v. Pendleton*, 1 Matthews, 516 a case in which a bill was filed to restrain the use of a building in a town as a slaughter-house.

The views which have been expressed support the decree of the Circuit Court and it will be affirmed.

Decree affirmed.

NOTE BY THE REPORTER. — In *Scriven v. Smith*, 30 Hun, the defendant conveyed to the plaintiff by a deed containing a covenant of warranty certain premises upon which was a grist and flouring mill, with water power and mill privileges appurtenant thereto. One Douglass owned the premises next below those so conveyed and had erected a dam thereon. At the time the deed was given, this dam did not back the water upon the premises conveyed to the plaintiff, but Douglass had, and afterward exercised a right to raise the dam eight and one-half inches higher, whereby the water was thrown back upon the plaintiff's premises, injuring his mill privileges and the foundation of his buildings and overflowing a portion of his land. Held, that the plaintiff was entitled to recover the damages so sustained in an action against the defendant for a breach of the covenant of warranty contained in the deed. BOARDMAN, J., in the prevailing opinion, thought that "neither *Adams v. Conover*, 87 N. Y. 422; s. c., 41 Am. Rep. 381, nor *Green v. Collins*, 86 N. Y. 246; s. c., 40 Am. Rep. 531, seems to me to apply strictly to the case before us, * * * It is not whether the plaintiffs took an apparent easement to discharge a sewer upon a stranger to the deed as in *Green v. Collins*, nor whether they took an apparent easement to maintain water upon the lands of a stranger to the deed. The question here presented is whether the plaintiffs are entitled to have, possess and enjoy what they bought. The lands are described in the deed by metes and bounds. The vendor has given the common covenants of warranty, and for quiet and peaceable possession of the premises conveyed. The adjoining owner below establishes and exercises his legal right to flood a portion of said lands with water by his mill dam. The principle would be the same if his right authorized him to flood every rod of the land conveyed to the plaintiffs. Would such an act, legally done, constitute a breach of the defendant's covenant? Is the plaintiff, in legal effect, deprived of the possession, of the use, of the enjoyment of such lands as are under water, by virtue of Douglass' right? If the plaintiffs' possession is taken away by a paramount title the action will lie for a breach of the covenant for quiet enjoyment. It is as effectually taken away in this case at the election of Douglass as though he had the title in fee simple. To the extent that the lands deeded by defendant to plaintiff are taken possession of by Douglass to maintain his dam and sustain his head of water, the plaintiffs are injured and have their action for the breach of the covenant. It has been so decided in an analogous case in this department in *Rea v. Winkler*, 5 Lans. 196. That was a private right of way over the lands, a much less obnoxious disturbance of possession than the present. * * * It is difficult to reconcile or distinguish all cases to be found in the books on this subject. But it seems proper to follow the decision of our own court until it is overruled." LEARNED, P. J., dissented in an elaborate opinion, reviewing the authorities. Among other things he observes: "So far then as the defendant's rightful act affected or took away only an easement, which at the time of the conveyance appeared to be appurtenant to the premises, it was not an eviction which gave a cause of action upon the covenant of warranty. This seems to be definitely decided by *Green v. Collins*, *ut supra*. That was the exact point discussed in that case and passed upon by the General Term, 30 Hun, 474. * * * It is however claimed that the present case is controlled by the decision in *Adams v. Conover*. These two cases are analyzed and compared in 26 Ab. L. J. 279, and the distinction is there supposed to be that the easement in the one case related to a dam; in the other, to a drain. But as the court in *Adams v. Conover* adhere to the doctrine of *Green v. Collins*, it is necessary to see if possible what the dis-

inction is. There are some expressions in the opinion in *Adams v. Conover*, which I suppose cannot be exactly accurate. It is said that the grantee 'lost by force of the paramount title a thing actually conveyed.' Again 'the deed conveyed the dam at its existing height.' Again 'the deed both conveyed and as we construe it, purported to convey the identical thing destroyed by a paramount title.' Now I suppose, that if the thing had been in fact conveyed by the deed, it could not have been lost by the paramount title. The grantee lost what was not conveyed by the grant, but what the covenant bound the grantor to protect. Covenants of warranty are broken, because the deed does not convey the thing which it purports to convey; and hence the grantee is evicted by a paramount title. So again it is said in the opinion, that in *Green v. Collins*, the grantee was not evicted from any thing which passed by the grant. Certainly not, because if it had passed by the grant, he could not have been evicted. The question in all these actions on covenant is not what passed by the grant, but to what did the covenant bind the grantor. Now in *Adams v. Conover* there was a dam on the premises, the effect of which was to overflow the land of one Felt, lying higher up on the stream. The court say, that if there were nothing else of the case than the apparent easement on Felt's land such apparent easement would not be within the covenant of warranty. But they say that the deed (not of course by any express language therein), purported to convey the dam as it existed, as it stood, and the water-power it thus indicated and measured. And that as the plaintiff was compelled to reduce the height of that dam, he was deprived of a part of the property which the deed purported to convey. I understand then the court to hold that the apparent easement to flood Felt's land was not guaranteed by the covenant; but that the existing height of the dam was. And that where the grantee was compelled to lower his dam, the covenant was broken. That is to say, I understand the decision to hold that the ordinary covenant or warranty guarantees the right to retain all structures upon the premises in the same condition in which they were at the time of the grant, excepting perhaps sewer pipes in a building. * * * I suppose therefore that even if the premises, either in the present case or in *Adams v. Conover*, had been described as containing a water-power, there would be no implied covenant that such water-power existed. Or if the deed had described the height of the water-power I suppose that no covenant could be implied as to the height. The doctrine then of *Adams v. Conover* must be that the mere covenant of warranty guarantees to the grantee the right to retain all structures on the land, as they were at the time of the grant, excepting probably sewer pipes in a building. It seems to me that in *Adams v. Conover* the court hold that a lawful prevention by paramount title of the overflowing of Felt's land was not a breach of the covenant of warranty. But that a lawful lowering of the structure of the dam by such paramount title was such breach. If in that case the water had not overflowed Felt's land, but if Felt had had the right to require the dam to be lowered, the decision must have been the same. * * * I suppose that the Revised Statutes intended to require grantees who desired to protect themselves to have the necessary covenants inserted, to leave nothing to implication or inference. It has been well settled that the covenant of warranty is broken only by eviction; that is by the actual taking away the whole or some part of the land which by the deed purported to be guaranteed. Mere limitations or restrictions upon the use of the land are not evictions. The title remains in the grantee, and the possession. The easement may be a great incumbrance. But a covenant of warranty is not a covenant against incumbrances. And a covenant of quiet enjoyment is practically the same as a covenant of warranty." See notes, 40 Am. Rep. 261, 557.

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(76 Va. 517.)

Contract — consideration — time, when of essence — specific performance.

The consideration of love and affection alone will not warrant a decree of specific performance.

G. leased land to his son-in-law for a term of years at an annual rent. During the term he promised in writing that if the lessee by a specified time would pay the arrears of rent and all the rent to accrue, and certain other amounts due him, he would, in consideration of love and affection for his daughter, convey the land in fee for her separate use. The lessee made the payments, but not within the specified time. *Held*, that specific performance would not be decreed.

BILL for specific performance.

J. A. Gilmore and R. A. Richardson, for appellants.

John A. Campbell, for appellee.

STAPLES, J. The bill alleged that Dr. Keffer, one of the appellants, surrendered the possession of the tract of land held by him under the lease of the 29th September, 1871, in order that the appellee might carry out his expressed intention of dividing the tract among his three daughters, one of whom is the female appellant, the wife of Dr. Keffer. With this understanding the agreement of the 1st September, 1874, was entered into, by which the appellee undertook to convey the land in controversy to the female appellant. Had the truth of these allegations been established by the evidence, there is no doubt, I imagine, but that a court of equity would decree a specific performance. They are however positively and plainly denied in the answer, and the only testimony adduced to sustain them is that of Dr. Keffer himself. The agreement of the 1st of September, 1874, states, or professes to state the consideration upon which the promise to convey is founded. No reference is there made to the surrender of the land held under the lease, nor is it intimated that Dr. Keffer, in making such surrender, was influenced by the promise of the appellee to make the settlement upon his daughter.

To decree a specific performance against the positive denial of

the answer upon the unsupported testimony of the opposing party, would be to run counter the plainest rules of equity jurisprudence.

In order then to ascertain the real consideration of the promise to convey, we must look to the written agreement. It is there stated to be the natural love and affection which the appellee bears the appellant, Dr. and Mrs. Keffer, and the undertaking of Dr. Keffer to pay the appellee, on or before the 1st of January, 1877, a past rent of \$18, the rents to accrue for 1875 and 1876, and all his other liabilities to the appellee. Upon the fulfillment of these terms and conditions the appellee stipulated that he would make the conveyance to his daughter.

It will be seen that this agreement imposed no obligation upon Dr. Keffer.

It was left optional with him whether he would or would not make the payments. If he made them, his wife was entitled to the conveyance. If he did not, he would continue in possession as lessee at an agreed rent until the 1st January, 1877. The contract was one therefore by which only the appellee was bound. But if it be conceded that Dr. Keffer was also bound, still the contract created no additional liabilities, imposed no new obligations upon him. On his part it was simply an undertaking to pay certain rents, for which he was or would be responsible as lessee, and also to pay certain other debts he owed the appellee.

A debt barred by limitation or by a discharge in bankruptcy, may be revived by a new promise, and the new promise may constitute a valid consideration. But a promise to pay a debt for which the promisor is already legally bound is a mere *nudum pactum* and adds nothing to the force of the previous obligation. No man can make his own wrong in withholding what he justly owes the foundation of a demand against his creditor. It is therefore clear that a promise to pay a subsisting indebtedness, or even its actual payment, is not a consideration upon which a court of equity can decree the specific execution of an agreement for the conveyance of real estate. It is impossible to say there is a valuable consideration where the debtor does no more than the law compels him to do, and the creditor receives no more than he is entitled to receive.

If therefore Dr. Keffer had discharged all his indebtedness to the appellee by the 1st of January, 1877, such discharge would not

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of itself have given him any claim to call for a conveyance. He did not however, as is conceded, comply with his contract in this particular. He did not make the payments on or before the 1st January, 1877. A reference to the agreement of the 1st September, 1874, will further show that it did not operate as a transfer of any title, legal or equitable, to Mrs. Keffer. It was not a sale of an interest in the premises, but a mere agreement to convey upon the performance of certain acts by one of the parties, on or before a particular day. Until the performance of these acts Dr. Keffer occupied the position of a tenant paying rent, and not of purchaser or owner of the premises. This compliance with his contract at the appointed time was therefore a condition precedent to the transfer or vesting in him or his wife any interest or estate under the contract.

The authorities draw a distinction between a contract of purchase under which a right has passed and the purchaser has taken possession and made valuable improvements, and a contract under which no title or interest is acquired by the purchaser until the doing of some act by him stipulated to be done.

In the first case a right has vested which will not be defeated by the failure to do the act at the appointed day if compensation can be made in damages. In the other case the performance of the act is a condition precedent to the vesting of any estate, and time becomes the essence of the contract. *Wells v. Smith*, 7 Pai. 22; 31 Am. Dec. 274.

If, said Lord CRANWORTH, in *Brooke v. Garroll*, 3 K. and Jones, 608, the contract be that on the payment of \$1,000, at or before a specified day, a certain act shall be done on my part, I am at a loss to see why I can possibly be called on to do the act if the money be not paid at the day, or why I should be compelled to perform not my contract, but another contract into which I have not entered.

In *Kerr v. Purdy*, 51 N. Y. 629, the bill alleged that the defendant leased certain premises to the complainant for the term of five years, with a clause giving the lessee the privilege of purchasing at any time within the first three years by paying all the arrears of rent and the sum of \$10,000. The plaintiff was in arrears for the rent, and did not pay the purchase-money before the time expired, although he had made arrangements to do so. The court held that the right of the plaintiff to a specific execution depended on pay-

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ment within three years, and ceased when they elapsed without the fulfillment of the condition. 2 Lead. Cas. in Eq., part 2, p. 1136; Pomeroy Cont., §§ 472, 411, 374. The general rule is therefore that in unilateral contracts time is regarded as the essence of the agreement, to be modified or varied however by peculiar circumstances which account for the delay and show that notwithstanding the failure to perform, the party in default is still entitled to relief.

It would seem to be very clear that this is not a case constituting an exception to the general rule.

Here the father, in consideration of the love and affection he bears his daughter and her husband, proposes to settle an estate upon the former, subject however to the express condition that the husband shall, on or before an appointed day, pay all his indebtedness to the father, and also the accruing rents for the use of the property in the meantime — the condition not being complied with, the obligation to convey is at an end upon the plainest principles of equity and justice. It has been said however that the subsequent receipt of the money operated as a waiver of the condition. I do not think so. The appellee was only receiving payment of an existing indebtedness to which he was justly entitled, independently of the contract of purchase.

He must of necessity have received it, unless he intended to relieve his debtor from all liability without payment.

We come then to the main question whether the consideration of love and affection is sufficient to justify a decree for a specific execution.

This question has not been directly passed upon by this court, although there are *dicta* of learned judges in several reported cases. In *Jones v. Obenchain*, 10 Gratt. 259, it was held that a conveyance from a husband to his wife, although inoperative in a court of law, would be upheld in a court of equity against a collateral relative of the husband. The deed was intended by the husband as a present transfer of all his interest as complete as he could make it, and would have passed the estate but for the technical rule of the common law which forbids a conveyance by the husband to his wife.

Judge ALLEN, in delivering the opinion of the court, was careful to say that the relief sought was not against the grantor himself or a subsequent purchaser, or one standing in the relation of a wife or child, but a collateral relation, the nephew of the grantor.

That case was followed by *Sayers v. Wall*, 26 Gratt. 354, in

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which it was held that a deed from a husband to his wife would be supported against subsequent creditors who had constructive notice of the conveyance. It is only necessary to refer to the opinion of Judge ANDERSON, which contains an elaborate discussion of the principles of law governing in such cases.

In *Burkholder v. Ludlam*, 30 Gratt. 255; s. c., 32 Am. Rep. 668, this court decreed a specific execution as against creditors, because the donee, induced by the promise of his father-in-law, had altered his condition and made expenditures of money in valuable improvements on the land. In that case Judge BURKS, in delivering his opinion, took occasion to say that a court of equity will not lend its aid to carry into execution contracts or agreements based wholly on a meritorious consideration.

This remark, although not called for by any thing in the case then under consideration, is fully sustained by the current of authorities, certainly so far as they relate to suits for specific execution against the grantor himself, or other persons having equally meritorious claims with the party applying for relief. In England the doctrine seems to be well settled that a promise made without a valuable consideration in favor of a child will not be enforced against the promisor himself, or against any one in whose favor he has altered his intention, or against a child for whom no provision has been made. *Adams Equity*, p. 98; 1 *Perry on Trusts*, §§ 107, 108.

The doctrine laid down by Lord Chancellor SUGDEN, in *Ellis v. Nimmo*, L. & G., 333, was afterward abandoned by him in *Moore v. Crofton*, 3 Jones & Lat. 442, and has been long since overruled by the later English cases.

In this country there is a considerable conflict of opinion on the subject. The books containing the adjudged cases are not to be found in the library at this place. It would seem that in some of the States the English rule has been followed; in others it has been repudiated. Mr. Justice STORY, in the first volume of his *Equity Jurisprudence*, § 372, uses the following language: "It has been said that a post-nuptial voluntary agreement by a father to make a provision for a child, will be specifically enforced in equity as founded in moral duty. But this doctrine, although it has the support of highly respectable authorities, seems now entirely overthrown." See also, §§ 433, 793, 987; *Bispham Princ. of Eq.* 108, 430.

The opinion of Judge Story is not merely sustained by the great weight of authority, but by the soundest considerations of justice and reason.

It is after the death of the parent that the meritorious consideration becomes such a powerful plea in a court of equity. The child has then lost the personal support of the parent, and therefore it is that the courts in such cases incline to execute a covenant in favor of a child. But it will never do so when the effect will be to leave other children wholly unprovided for. In this case if the appellee were dead, leaving some of his children without portions, this court would not against them decree the execution of this contract, because these children stand upon grounds equally meritorious with the appellants. Have these appellants, or any of the children stronger claims upon a court of equity than the appellee, their father? I admit that if a son, influenced by the promise of his parent, puts valuable improvements upon the property, or foregoes the means of advancement in the world, or otherwise sustains loss or damage, a very different case would be presented. But I wish to know if a parent having, as he supposes, ample means to advance his children, puts a son in possession of a tract of land with a promise, verbal or written, to make him a deed, and the son pays nothing and loses nothing, is the parent cut off entirely from the *locus penitentia*? Is he bound to make good his promise whatever may have been the change in his circumstances? If his property is diminished in value, or destroyed by fire or tempest, or if he be overtaken by debts which sweep away his estate, will a court of equity compel him to impoverish himself for the purpose of enriching his son?

One of the strongest holds which the parent has upon the fidelity and attentions of his children is through the instrumentality of his property, thus enforcing an obedience which filial affection does not always render.

Not unfrequently the parent finds that his confidence in his child has been misplaced — that the latter from his dissipated habits, or propensity for wild and reckless speculation, is unfit to be trusted with the control and management of property. To compel him under such circumstances, to execute the gift, is to take from the parent the power of making such disposition of the estate as will secure the good conduct and promote the interests of the child.

It is not a matter of surprise that this doctrine of meritorious

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consideration has never found favor in the courts of equity, and as has been well said by Judge Story, must be deemed now overthrown by the weight of more recent adjudications. 1 Story Eq. J., § 433.

I cannot better conclude this opinion than with an extract from an able article on the subject in Lewin on Trusts, 95:

"It is clear," says this author, that an agreement founded on meritorious consideration will not be executed as against the settler himself. *Antrobus v. Smith*, 12 Ves. 39. Indeed relief in such case would offend against the security of property. If a man imprudently binds himself, by a complete alienation, the court will not unloose the fetters he hath put upon himself but he must lie down under his own folly. *Villers v. Beaumont*, 1 Vern. 100. But if the court interpose where the act is left incomplete, what is it but to wrest property from a person who has not legally parted with it? Again if the imperfect gift can be enforced against the settler himself, then the equitable right must form a lien upon the property, and upon the death of the settler his heir would in all events be bound to convey, but even in aiding the defective execution of powers and supplying surrender of copyholds, a previous inquiry by the master is invariably directed, whether the heir of the settler has any other adequate provision."

For these reasons I am for affirming the decree of the Circuit Court.

Decree affirmed.

 LYNCHBURG FIRE INSURANCE COMPANY V. WEST.

(76 Va. 575.)

Insurance — innocent overvaluation.

An innocent overvaluation does not vitiate insurance.*

ACTION on a fire insurance policy. The opinion states the point. The plaintiff had judgment below.

John E. Penn, for appellant.

* See *Holding v. Srea Ins. Co.* (54 Cal. 156), 35 Am. Rep. 72, and note 74.

J. L. Tompkins, and A. A. Phlegan, for appellee.

STAPLES, J. [Omitting other matters.] We come next to the plaintiff's third instruction. It is as follows :

"The court instructs the jury that if they believe from the evidence that the plaintiff, in fixing the value of the property, real and personal, insured at the time he made his application, fixed the amount by his opinion of its value, and had no intention to defraud the company, the policies are not void or forfeited, though they may believe from the evidence that the plaintiff fixed the value too high."

This instruction was given by the court.

The defendant then asked the court to give the following : "If the jury believe from the evidence that John T. West made an overvaluation in the application for the insurance of the storehouse, and that such overvaluation was material in amount, then they must find for the defendant on the policy in reference to the said storehouse."

The plaintiff's instruction asserts the proposition that an overvaluation does not invalidate the policy unless made with a fraudulent intent. On the other hand, the proposition asserted in the defendant's instruction is, that an overvaluation, if material in amount, annuls the policy, even though made without a fraudulent intent. It is not very certain whether the draftsman of the instruction meant to affirm that the statement of the value of the property constituted a warranty, or whether such statement was a mere representation which would invalidate the contract of insurance if the overvaluation should be material. The difference between them is radical and well understood.

A warranty is a stipulation inserted in a writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. By a warranty the assured stipulates for the absolute truth of the statement made, which is in the nature of a condition precedent. A representation is a statement incidental to the contract. If false, and material to the risk, the policy is avoided, whether the misrepresentation be willful or made in good faith through a mistake. It is well settled that a mere misrepresentation of the value of property does not vitiate the policy, unless the overvaluation be gross and clear, such as is or must be presumed to be known to be such by the insured, and not known to

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the insurer, and therefore false and fraudulent. May on Insurance, § 373; *Franklin Insurance Company v. Vaughan*, 2 Otto, 516.

The overvaluation must be intentional and fraudulent, and not a fair expression of the honest judgment of the insured, and the fact that the property is considerably overvalued does not of itself establish such fraud on the part of the assured as avoids the policy. Wood on Insurance, 427.

I do not mean to assert a representation of value cannot in any case constitute a warranty. Doubtless it may be so made by the express contract of the parties. The courts however are almost universally indisposed so to construe policies of insurance. The value of the property, especially if real property, is always to a considerable extent a matter of opinion and judgment, about which men differ widely and honestly. To hold that the insured forfeits his policy because he may have innocently placed an overvaluation upon his buildings or upon his goods, is to lay down a rule which is pregnant with mischief and abhorrent to every right-thinking mind. The value of property generally is only to be ascertained by the opinion and judgment of witnesses, and if the witnesses differ with the assured, it would not always prove that his estimate is erroneous, unless indeed the overvaluation is so excessive as to amount to proof of fraud. It seems to me, that whenever the application is incorporated in the policy as a warranty, the warranty should be regarded as relating only to matters of which the assured had, or should be presumed to have had, some distinct, definite knowledge, and not to such matters as depend wholly upon opinion and judgment. Wood on Insurance, §§ 426-7.

Let it be conceded however that in this case the application is a part of the policy, and that it is by the policy made a warranty. If such it be, all its terms and provisions must be considered as incorporated in and inserted at large in the policy. Now looking at the application, we find that the assured, after answering the various interrogations proposed to him with reference to the risk, has subscribed the following covenant—that is to say, “his answers constitute a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to him and are material to the risk.” This is not the language of a warranty, but a mere representation of facts and circumstances, so far

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as they are known to the applicant. He is not to be considered as absolutely warranting the truth of his statement, but that he held himself responsible for a true exposition, so far as the facts and circumstances are known to him. It was in effect a covenant of good faith ; a covenant that all the company required was a frank disclosure of all such material facts as were within the knowledge of the applicant. Now if by the policy the application constitutes a warranty, an entirely different effect is given to the statements of the assured from what is expressly stipulated in the application itself. This would be to impute to the company a purpose, by studied intricacy of language or an ingenious framing of the policy, to entrap the assured into incurring obligations which, perhaps he had no thought of assuming. But let us look at the policy itself. It declares that "if an application is referred to in this policy, such application shall be considered a warranty," and this is the only reference to the application in the policy. This provision is succeeded immediately by the following stipulations: "And any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk or an overvaluation, or any misrepresentation, either in a written application or otherwise, etc., shall avoid the policy."

Now it is obvious that these stipulations refer not to innocent or immaterial mistakes by the assured, but to willful and material misrepresentations. Why were they inserted in the policy, if the representations of the assured constitute a warranty? Upon the supposition that such representations are warranties, the stipulations themselves are not only superfluous, but they are mischievous and calculated to mislead. At all events, if the construction of defendant's counsel be correct, the policy is contradictory in its terms ; for in one part the insured is made to say that he warrants the truth of every representation, and in another he is required to give a true exposition, so far as the facts and circumstances are known to him.

In every such case the court leans to that construction which avoids a forfeiture and preserves the rights of the assured. Upon this point we have an express authority in a late case decided by the Supreme Court of the United States. *First Nat. Bk. of Kansas City v. Hartf. F. Ins. Co.*, 5 Otto, 673. In that case the application contained a covenant similar to the one here, and many of

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the provisions of the policy were substantially the same as in this case. Mr. Justice HARLAN, in delivering the opinion of the court, said that two constructions of the contract might be suggested.

According to one, the assured would be held as only warranting that he had stated all material facts in regard to the condition, situation, value and risk of the property, so far as they were known to him. And this was perhaps the construction most consistent with the liberal import of the terms used in the application and the policy.

According to the other, the warranty is to be regarded as relating only to matters of which the assured had, or should be presumed to have had, distinct, definite knowledge, and not to such matters as values which depend upon mere opinion or probabilities.

But without adopting either of these constructions, the learned judge rested his opinion upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court leans against that construction which imposes upon the assured the obligation of a warranty. It was accordingly held in that case that notwithstanding the assured had over-estimated the value of his property, the policy would not on that account be vitiated, unless it could be shown that the estimate was intentionally excessive and therefore fraudulent. The instruction given by the Circuit Court is in conformity with these principles and the current of authorities elsewhere, and is a correct statement of the law governing in this case. It is unnecessary to discuss the motion for a new trial. The evidence before the jury clearly justifies the verdict. There was no proof of any fraud on the part of the plaintiff; indeed, the verdict negatives its existence. The testimony with regard to the value of the property was conflicting, and as fixed by the jury, was not excessive, according to the opinion of several witnesses.

Upon the whole case, there is no error in the judgment, and the same must be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

KRAUS V. THOMPSON.

(80 Minn. 64.)

Sale — rescission for fraud, after judgment for price.

The right of the vendor of goods to rescind the sale, for fraud on the part of the vendee, is not defeated by his having obtained judgment for the price in ignorance of the fraud.

ACTION against a sheriff to recover for goods sold under execution. The opinion states the point. The plaintiff had judgment below.

Morrison & Von Norman and Woods & Hahn, for appellants.

Cilley & Bloom, for respondent.

MITCHELL, J.* The question presented by this case for consideration is this : Does the fact that a vendor of goods, in ignorance of fraud on the part of his vendee sufficient to authorize a rescission of a sale, has obtained judgment against his vendee for the

* GILFILLAN, C. J., because of illness, took no part in this case.

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purchase-price of the goods, amount to an affirmance or ratification of the contract of sale, so as to preclude him from subsequently rescinding, upon discovery of the fraud? It is proper to remark that the court below, in deciding this question in the affirmative, fortifies his decision by the suggestion, that although the evidence tended to show that the attorneys, on whose motion the judgments referred to in this case were entered, had no notice of the fraud, yet it did not appear that their clients, the vendors, were at the time in ignorance of the facts. We do not think that the language of the bill of exceptions, when considered in connection with the pleadings, will sustain this suggestion. The complaint alleges that the vendors did not discover the fraud until on or about July 10 (the judgments by confession were obtained by the attorneys July 2), and that upon discovery of the fraud, they rescinded the contracts of sale, and that after such discovery they have done nothing to affirm the sales. The bill of exceptions shows that the plaintiffs introduced evidence tending to prove all the issues in the action, and particularly evidence tending to show a rescission of each and every of the sales of goods mentioned in the complaint. The expression "that plaintiffs introduced evidence to prove all the issues in the action" is perhaps not a very happy one, but we think it must be construed as meaning, "tending to prove their side of the issues;" that is, all the material allegations of their complaint put in issue by the answer.

But the point made in this suggestion was clearly not the ground upon which the learned court rested his decision. The real ground was the supposed conclusiveness of the judgment *per se* as *res adjudicata*, or to put it in the words of the court himself, "a judgment, regularly entered, settles the ultimate rights of the parties, and being a security of a higher nature than other contracts, merges all claims of the parties respecting the matters on which it rests," and "if the vendors' right to rescind were ended by their entries of judgment, they could not be revived by the opening or setting aside of the judgments on their applications."

With all due deference to these views of the very able judge who decided this case, we think that his conclusions rest upon a misapplication of the doctrine of the conclusive effects of judgments as *res adjudicata*. Of course it is elementary that an issue once determined in a court of competent jurisdiction is an effectual bar to any further litigation of the same matter by parties and privies,

and that a judgment is conclusive upon the parties thereto in respect to the grounds covered by it, and the law and facts necessary to uphold it. But we fail to see how the right of a vendor to rescind a sale is in issue or determined in an action brought to recover the purchase-price of the goods sold, or how an attempted rescission after judgment in such a case is any collateral attack upon the conclusiveness of such judgment as to any matters determined by it. There never has been a judgment as to whether the goods were obtained by the vendee by fraud, such as would give the vendor the right to rescind. The judgment for the purchase-price determines that there was a sale in fact, and as to that it is of course conclusive. But a rescission of the sale controverts none of the facts in issue in an action for the purchase-money, but in fact admits them. A rescission proceeds upon the theory that there has been a sale, but voidable at the option of the vendor on the ground of the fraud of the vendee, and that having discovered this fraud, the vendor elects to avoid it. The invariable rule is that this right to rescind may be exercised upon discovery of the fraud, and that no acts in recognition of the existence of the contract of sale, done before such discovery, will amount to an affirmance or ratification, so as to preclude the vendor from rescinding when the grounds for rescission are discovered. Affirmance in ignorance of the facts authorizing rescission will not prevent the affirming party from afterward rescinding. *Pratt v. Phibrook*, 41 Me. 132. Accepting part of the purchase-money, in ignorance of the fact, has been often held no ratification. So as to the commencing an action, under the contract to recover the goods. *Clough v. London & N. W. Ry. Co.*, L. R., 7 Exch. 26.

Any act of ratification of the contract, after knowledge of the facts authorizing a rescission, amounts to an affirmance and terminates the right to rescind; but if done before such knowledge, it will have no such effect. And in our opinion, the act of obtaining judgment against the vendee for the purchase-price stands in that respect on the same footing as any other act recognizing the existence of the contract of sale, and must be governed by the same rules. The fact that the original claim against the vendee for the price of the goods is extinguished by the judgment is not material. The case is not different in that regard from what it would have been if the vendor had taken from the vendee his own note, or the note of a third party, in payment of the original claim.

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The point made by respondent, that a notice of rescission and a demand for the goods could not be made until after these judgments were vacated and annulled, is founded upon the same mistaken theory as the conclusiveness of the judgments to which we have already referred. See *Lloyd v. Brewster*, 4 Paige, 537; 27 Am. Dec. 83.

In our judgment therefore the court below erred in excluding the evidence tending to show that these judgments were, on motion of the vendors after discovery of the fraud, vacated and set aside, and in instructing the jury that as to the plaintiffs' first, fourth, eighth and twelfth causes of action they could not recover. This should have been submitted to them for determination upon the facts, under proper instructions.

Order denying a new trial reversed, and a new trial granted as to the first, fourth, eighth and twelfth causes of action set up in the complaint.

Order reversed.

DODDALL V. COUNTY OF OLMSTEAD.

(30 Minn. 96.)

Municipal corporation — county liability for defect in court-houses.

A county is not liable for an injury from a defective sidewalk appurtenant to the court-house.*

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment on demurrer.

Henry C. Butler, for appellant.

F. B. Kellogg, for respondent.

VANDEBURGH, J.† The sole question to be determined in this case is the liability of the county of Olmstead for an injury alleged to have been suffered by plaintiff from falling through a broken sidewalk upon the court-house premises, belonging to the county,

*See *Wise v. Newport* (13 R. I. 454), 43 Am. Rep. 35.

†GRIFFIN, C. J., because of illness, took no part in this case.

which had become unsafe and dangerous through the negligence of the county commissioners, whose duty it was to keep the same in repair.

For the purposes of civil administration, the State has created the subordinate political divisions of counties and townships. Their officers are public officers, selected or appointed under the general laws, and perform their duties, which are public, under the authority of the State. They are bodies politic, with limited powers defined by law, and are hence frequently called *quasi* corporations. Dill. on Mun. Corp. (2d ed.), § 10a. They are created wholly for a public purpose. The liability in this case is predicated upon the fact that the defendants, the board of county commissioners, are the agents of the county, and that the plaintiff has suffered personal injury from their official neglect. They are the agents of the county in this sense, that the powers of the county can only be exercised through them, because the public can only act through officers. The functions of these officers are public. They are only such as the law enjoins. It is their duty to keep the court-house in repair, because the law of the State commands it. It is a duty which they owe to the public, and they are accountable to the public alone for their negligence. It is not necessary here to refer to the distinction existing between mere neglect of official duty, and affirmative acts of individual officers resulting in special injuries, or between officers whose duties are wholly public, and those who owe a special duty to those whom they serve for a compensation, as in the case of sheriffs, county clerks, etc.

Where however a corporation receives a charter from the State, the enlarged powers granted, and the nature of the duties expressly or impliedly enjoined, have led to the distinction existing between municipal corporations proper and *quasi* corporations with limited statutory powers, as respects the question of liability to individuals for the negligence of their officers or agents. The almost unbroken current of the authorities is, that as to the latter class of corporations, no such liabilities attach unless expressly provided by statute. This doctrine is too well and too long established to be questioned, and should be regarded as the recognized policy of the State, which the legislature alone should change.

The order sustaining the demurrer to the complaint should be affirmed.

Order affirmed.

Ward v. Hackett.

WARD V. HACKETT.

(20 Minn. 180.)

Negotiable instrument — conditional delivery by surety — alteration — obtaining additional surety.

A surety on a negotiable promissory note, perfect on its face, cannot defeat a *bona fide* holder by proof that he delivered it to the principal on the condition that it should be signed by another surety, which condition was not fulfilled.

The obtaining by the principal of the signature of a surety to a promissory note before delivery to the innocent payee is not an alteration avoiding the note as to a precedent surety. (*See note, p. 191.*)

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Andrew C. Dunn, for appellants.

Blaisdell & Higgins and *Warner & Stevens*, for respondent.

MITCHELL, J.* Defendant Elwis signed a negotiable promissory note as surety for defendant Hackett, and delivered it to Hackett, upon condition that he should not deliver it to plaintiff, the payee, until he procured the signature of one Johnson as co-surety. Hackett failed to get Johnson's signature, but without the knowledge or consent of Elwis, got defendant Rice to sign it, and then delivered it to plaintiff, who took it in the ordinary course of business for a valuable consideration, without any notice of the facts hereinbefore stated and now set up by way of defense. Elwis now claims that he is not liable—first, because the note was delivered without Johnson's signature, contrary to the condition upon which he signed it and left it with Hackett; second, that the addition of the name of Rice to the note, without his knowledge or consent, amounted to a material alteration of the instrument, which discharged him. These two questions we will consider in the order named.

*CHAPMAN, C. J., because of illness, and DICKINSON, J., having tried the action in the court below, took no part in this case.

1. The form of the note, when Elwis signed it and gave it to Hackett, was such that it was apparently complete. There was nothing on the face of the paper indicating that any other co-surety was expected to become a party to the instrument, and no fact was brought to the knowledge of the plaintiff, before he accepted the note, calculated to put him on his guard, or which should have induced inquiry. Elwis by his acts clothed Hackett with apparent authority to launch the note as it then was. The surety having thus placed the instrument, perfect on its face, in the hands of the proper person to pass it to the payee, the law justly holds that as against the payee who takes it in good faith, for value, without any notice of this condition, the apparent authority with which the surety has clothed his principal shall be regarded as the real authority, and in such case the condition shall not avail the surety. This is too well settled to require discussion. Brandt on Suretyship, § 354, and cases cited.

2. The second point is more important. It has been very fully and ably argued by appellant, but unfortunately for us, the respondent has not deemed it necessary to discuss the question at any considerable length. The position of appellant is that the fact of Hackett's obtaining the name of another surety upon the note, without his knowledge or consent, although done before the note was delivered to plaintiff, amounted to a material alteration of the instrument, which discharged him, even although plaintiff had no notice of the facts when he took the note. If this be the law, we are satisfied its announcement would be a surprise to the business and commercial world. It would render commercial paper a very uncertain and unsafe subject with which to deal. But we have carefully examined all of the numerous cases cited by appellant, and do not find one that goes far enough to sustain him. Many of these cases hold that a material alteration of a note made by one of the promisors before its delivery, without the knowledge of the other promisor, makes the note void as against such other promisor, although the payee have no notice of the alteration when he takes the note. Such is doubtless the law. But upon examination these will all be found to be cases where the body of the note or the contract itself was changed, as by alteration of the date, rate of interest, or amount of the note. And the reason given, why, in such cases, the party is discharged, is the self-evident one that the contract is no longer the one he made. Numerous cases

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are also cited to the effect that the addition of a new party to a note, without the consent of the other parties, is a material alteration of the instrument. But these will be found to be cases where the new name was obtained after the note was fully issued and delivered to the payee, and at his instance or with his knowledge. We have been referred to no case, and have found none, going so far as to hold, where a surety signs a promissory note and intrusts it to his principal, and the principal, while the instrument is still inchoate and has not become effectual as a contract by delivery, procures an additional signer, that this would be a material alteration and release the first surety. Two of the cases cited might, at first sight, seem to favor such a doctrine, but upon examination, will be found not to sustain it, even if the payee knew, when he took the note, the circumstances under which the additional signature was obtained.

The case of *Haskell v. Champion*, 30 Mo. 136, was one where, at the instance of the payee, the names of new principal obligors were substituted in place of the original one, by changing the individual signature of one partner into the firm signature, thus attempting to make a party surety for persons for whom he had never agreed to be responsible.

The case of *Hall v. McHenry*, 19 Iowa, 521, contains *dicta* by some of the judges which go farther than any decision we have found. In that case the name of the additional surety was obtained before delivery of the note, but at the instance and for the benefit of the payee. After the note was delivered, the payee cut off the name of this additional surety, without the knowledge or consent of the first surety. WRIGHT, J., who delivered the opinion of the court, while admitting that he had found no authority to that effect, argues that thus adding a new surety, even before delivery of the note, would amount to a material alteration of the instrument, which would discharge the original surety, provided the payee knew, when he took the note, of the circumstances under which the additional name was added. He then states that the court was not agreed on this proposition, and then proceeds to decide the case upon another point, to-wit, that cutting the additional name off the note was a material alteration, which discharged the original surety.

The rule that a material alteration of a contract avoids it had its origin largely in the necessity of preserving and protecting the

integrity and sanctity of contracts. Properly applied, the rule is a salutary one. But the general sentiment of courts now is that the doctrine had been extended quite far enough, and that formerly, especially in England, it had been carried too far, and applied to cases not within the mischief intended to be prevented. Therefore the tendency now is, if not to restrict, at least not to extend it beyond what has been already decided. To hold that the obtaining of an additional surety to a note, under the facts of the case at bar amounted to an alteration of the instrument that would discharge Elwis, would in our judgment be harsh, technical, and work injustice, and establish a doctrine contrary to the general understanding of business men, which ought to be the law of such cases, and is the only just basis of the implied contract resulting from the facts. In dealing with commercial paper, complete on its face and signed by several parties, we apprehend it never occurs to a business man that it is incumbent upon him to inquire of each maker whether he understood when he signed the paper just what other parties were to sign with him, or whether any additional names have been subsequently added without his knowledge or consent. To require any such thing would be inconvenient, without reason, and an innovation upon business usages. The idea that when a person signs a note as surety, and delivers it to his principal, no other surety is to be obtained, and if the note cannot be negotiated in that form, it cannot be used at all, unless all parties consent to the introduction of a new surety, is, we apprehend, contrary to the general understanding of the commercial world.

It seems to us, that at least as against an innocent holder, the principal obligor, to whom the paper has been intrusted by the surety, has implied authority to obtain additional sureties, until the note is launched into the market by delivery to the payee ; and as already remarked, this common understanding is the only just basis of an implied contract resulting from the facts. Courts have, in some cases, gone so far in holding that the addition of a new name to a note, under certain circumstances, amounted to a material and unauthorized alteration of the instrument, that it may be difficult to state the principle which distinguishes some of these cases from the present, nor do we feel compelled to attempt to do so. But whether or not the reason we have suggested be the correct one, we are satisfied that neither upon principle nor authority did the obtaining of Rice as additional surety amount, under the facts of

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this case, to an alteration of the instrument such as to release Elwis. *Keith v. Goodwin*, 31 Vt. 268. See also, *Gardner v. Walsh*, 5 El. & Bl. 83; *Governor v. Lagow*, 43 Ill. 134; *Sampson v. Barnard*, 98 Mass. 359; *State v. Dunn*, 11 La. Ann. 549. As Rice's claim to be discharged is entirely predicated upon the assumption that Elwis was released, it is unnecessary to consider it further.

[Omitting a minor point.]

Order affirmed.

NOTE BY THE REPORTER.—This question has been variously decided. To the effect of the principal case are *Snyder v. Van Doren*, 46 Wis. 602; s. c., 38 Am. Rep. 739; and *Müller v. Finley*, 26 Mich. 249; s. c., 12 Am. Rep. 306; but to the contrary is *Hamilton v. Hooper*, 46 Iowa, 515; s. c., 26 Am. Rep. 161. Some of the earlier cases in the New York Supreme Court held contrary to the principal case. *McVean v. Scott*, 46 Barb. 379; *Chappell v. Spencer*, 28 id. 584. A later case in that court, founded on a several note however, dissents from that view. *Card v. Miller*, 1 Hun, 504. And to this effect is *Partridge v. Colby*, 19 Barb. 243. In *McCaughy v. Smith*, 27 N. Y. 39, three judges however dissenting, it was held that the note was not vitiated by adding a surety's name after it had been negotiated. The court distinguished *Chappell v. Spencer*, *supra*. In *Brownell v. Winnie*, 29 N. Y. 400, it was held that the second signer could not be allowed to object.

Bigelow says (Bills and Notes, 579): "The addition of another name to that of the maker of a note, without the consent of the maker, after its complete execution and delivery, is a material alteration." Citing *Hamilton v. Hooper*, *supra*; *Haskell v. Champion*, 30 Mo. 128; *Bowers v. Briggs*, 20 Ind. 189; *Wallace v. Jewell*, 21 Ohio, 171. "But the fact that the payee of a note procures the signature to the same of an additional surety, without the consent of the additional surety, is not an alteration to discharge the new surety, though he executed the note solely because of the apparent liability of the original surety, who was now availing himself of the addition as a defense." Citing *Crandall v. First Nat. Bk.*, 61 Ind. 349.

Daniel says (Neg. Inst., § 1289): "On the whole we think it may be regarded as an immaterial alteration."

ALTNOW V. TOWN OF SIBLEY.

(30 Minn. 186.)

Municipal corporation — town liability for highway.

A town is not civilly liable for an injury by a defect in a highway, in the absence of a statutory declaration to the contrary.

ACTION for injury to a portable steam-engine by a defect in a highway and bridge. The opinion states the point. The defendant had judgment below.

Geo. D. Emery, for appellants.

Sylvester Kipp, for respondent.

BERRY, J. Is a statutory town liable in a civil action for damages resulting from the disrepair of a public highway?

This question, though new here, has often been answered by other courts. The very great preponderance of authority holds that no such liability exists, unless by express statute. A multitude of adjudged cases upon the subject are collected by Chief Justice GRAY, in *Hill v. City of Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332; see also 2 Dill. Mun. Corp., §§ 996, 1,000; 1 Thomp. Neg. 618, 620, and numerous citations.

The ground upon which the exemption from liability is usually placed is substantially this: A town is a *quasi* and public corporation only, and as such, a part of the government of the State. The duties enjoined upon it by law are enjoined upon it as a part of the government, and not otherwise. They are therefore public in nature; that is to say, they are duties to the State, and not to private persons. Hence, a breach of one of them creates a liability to the State only, a public liability, on account of which an offending town may be amenable to a public action by indictment. This is the general rule. Exceptions may of course be made by statute, so that in addition to, or in place of, the public liability, a town may be subjected to a private action for damages.

In this State, while it is made the duty of towns to keep public highways in repair, there is no statute imposing upon them a liability to private persons for damages resulting from a failure to perform the duty. We are therefore of opinion, in accordance with the great weight of authority, that a statutory town is not liable in a civil action for damages resulting from the disrepair of a public highway. That this conclusion is also in accordance with the general understanding prevailing in the profession and in the community ever since the organization of the territory (over thirty years) is pretty clear, when it is considered that there is no instance, so far as we discover from the briefs of counsel or otherwise, of an attempt to support such an action as this in this court. This is a consideration of weight when the frequency of the occasions for such actions, if they were maintainable, is borne in mind. As remarked by ASHURST, J., in *Russell v. Men of Devon*, 2 T. R. 667: "It is a strong presumption that that which never has been done cannot by law be done at all."

Altnow v. Town of Sibley.

Reference is made by counsel to the fact, that as held generally and by this court, *Sharile v. City of Minneapolis*, 17 Minn. 308; *O'Gorman v. Village of Morris*, 26 id. 267, and many other cases, municipal corporations having special charters, with provisions imposing the care of streets upon them, are liable in private actions for disrepair of streets; and it is contended that as by statute it is made the duty of towns to keep highways in repair, and taxation for that purpose authorized, the rule of liability applicable to the corporations mentioned ought to be applied to them also. But whatever may be the reasons assigned, and whether they are consistent; or in all instances sensible or not, the distinction between the two cases is clearly and firmly established. See authorities *supra*.

The fact referred to by plaintiff's counsel, that under the statute now in force, a town is organized upon the petition—the voluntary request—of a majority of the electors within its proposed territory, does not bring them within the rule applied to municipal corporations with special charters, or its alleged reason. It is said that this defendant was not organized under the present statute; but irrespective of this and whatever the fact may be, the petitioners for a town organization simply avail themselves of a general law under which an organization of a town may be effected, that is to say, of a town with its ordinary and statutory powers and liabilities. In principle, we perceive no difference between this case and *Dosdall v. County of Olmstead*, *ante*, p. 96,* in which a rule analogous to that above stated was applied to a county, and upon like grounds.

Order affirmed.

GILFILLAN, C. J. I find it hard to distinguish in principle between cities and towns in respect to their liability for neglect of the duty imposed upon them to repair streets and highways. But the distinction is established by the great mass of authorities, and was recognized and acted on by this court in *Dosdall v. County of Olmstead*, *ante*, p. 96.* That case, I think, disposes of this.

Ante, p. 186.

Red River Roller Mills v. Wright.

RED RIVER ROLLER MILLS V. WRIGHT.

(30 Minn. 242.)

Water and water-courses — throwing refuse in stream.

The owner of a saw-mill upon a stream has no right to suffer saw-dust or other refuse from the mill to fall into the stream, to the injury of a lower proprietor, although there is no other way of disposing thereof without rendering the mill useless, and it is the custom so to dispose thereof, unless it also appears that the mill could not have been constructed so as to avoid the necessity.*

ACTION for injunction. The opinion states the case. The defendant had judgment below.

J. W. Mason, for appellant.

D. A. Secombe, for respondent.

MITCHELL, J. This action was brought by the plaintiff to restrain defendant's intestate from depositing, in the Red or Otter Tail river, saw-dust and other refuse from his saw-mill, which floats down the river and clogs up the flume and wheel of plaintiff's flouring-mill, to its great damage and annoyance. Both parties are riparian owners upon the same stream, the plaintiff owning and operating a flouring-mill below, and defendant a saw and shingle-mill above, by the water-power of the stream. The facts are fully and specifically stated in the findings of the court, from which it appears, in substance, that the defendant's saw and shingle-mill is constructed over the water of the river, so that when operated the saw-dust, bark and other refuse fall into the stream, and are carried down by the current through and into the rack and flume of plaintiff's flouring-mill, situated about 1,000 feet below, and collect therein, and retard the action of the water in passing through the flume, rendering it necessary for the plaintiff to employ extra help to keep the saw-dust and refuse from its rack; and that even with the use of such means, it still materially and seriously injures and damages plaintiff in the operation of its mill,

*See *Cranfield v. Andrews* (54 Vt. 1), 41 Am. Rep. 823.

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by preventing it from operating it to its full capacity, and by rendering the flow of water unsteady and not uniform, thereby rendering it impossible at times to manufacture the best grades of flour. The damage to plaintiff from these causes is at times very serious, on one occasion \$200 in one week.

The defendant's saw and shingle-mill is so constructed that this saw-dust and refuse cannot be otherwise disposed of than by permitting it to thus fall into the stream, without practically destroying its value as a water-power mill; that owing to the construction of buildings adjacent to the mill, and owing to the formation of the land in the vicinity, there is no available method by which this refuse can be otherwise disposed of, without rendering the mill, as it now stands and is constructed, useless as such; that it is the custom of others operating water-power saw-mills in this State to permit saw-dust and refuse therefrom to be thrown into the streams upon which such mills are erected. The court then finds, as a final and general conclusion of fact, that this casting or throwing of this saw-dust and refuse from this saw-mill into the water by defendant, as aforesaid, is a reasonable use of said stream, and that in no other way could he utilize or operate his mill with profit. We have examined the testimony and are of opinion that all these findings, unless it be the final and general one, are sustained by the evidence.

It appears that the defendant's mill was built and in operation some two years before the construction of the plaintiff's mill. But this fact does not give defendant any extra or special rights in the matter. It also appears that plaintiff acquired title to its mill-site through deeds from defendant's intestate and other grantors, which granted to it the right to the use of the water of the river for the purpose of operating its mill, in the following words: "And also the right perpetually to use the water from said dam and canal, free from charge or rent, or from interference or detention." These conveyances are not before us, but we must understand this clause as referring to the right to the flow of the water, from the pond and canal which supply defendant's mill, to the mill of plaintiff. We do not think the terms of this grant have any bearing upon this present case. Its effect is not to convey the use of all the water in a regular flow, or in its natural condition uninterrupted or unaffected by the reasonable use of the stream above, but the grant must be construed as subject to the reasonable use of

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the stream by the grantor, giving to each party a community of right to the use of the water, but leaving the question of what constitutes a lawful or reasonable use to be settled by general principles of law, independent of the grant. *Merritt v. Brinkerhoff*, 17 Johns. 306; 8 Am. Dec. 404; *Haskins v. Haskins*, 9 Gray, 390.

The case therefore resolves itself into the single question, was the court below justified, under the facts, in finding that this use of the water by defendant was a lawful and reasonable one? The rules of law applicable to cases of this kind are, as settled by the authorities, as follows :

1. The general principles which govern the abstraction or diversion of water must govern in respect to the deposit of waste matter in the stream, resulting from the process of manufacturing, viz., a reasonable use must be made, and nothing more. *Hayes v. Waldron*, 44 N. H. 380.

2. The right of a party to the uninterrupted and full use of the water as it flows naturally past his land is not an absolute right, but a natural one, qualified and limited by the existence of like rights in others. His enjoyment must necessarily be according to his opportunities, prior to those below him, and subsequent to those above him, and liable to be modified or abridged by the reasonable use of the stream by others. *Merrifield v. City of Worcester*, 110 Mass. 216; s. c., 14 Am. Rep. 592; *Palmer v. Mulligan*, 3 Cai. 307; 2 Am. Dec. 270; *Platt v. Johnson*, 15 Johns. 213; 8 Am. Dec. 233.

3. The law does not lay down any fixed rule for determining what is a reasonable use of the water of a stream by a riparian owner. What constitutes a reasonable use is not a question of law, but of fact, to be determined by the jury or the court from all the circumstances of the case. But like any other finding of fact, it is subject to review, and will be set aside if against the evidence or not supported by it. *Hayes v. Waldron*, *supra*; *O'Riley v. McCheaney*, 49 N. Y. 672; *Prentice v. Geiger*, 74 id. 341; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Snow v. Parsons*, 28 Vt. 459.

4. In determining what is a reasonable use, regard must be had to the subject-matter of the use; the occasion and manner of its application; the object, extent, necessity and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury to the other party; the

state of improvement of the country in regard to mills and machinery, and the use of water as a propelling power; the general and established usages of the country in similar cases; and all the other and ever varying circumstances of each particular case, bearing upon the question of the fitness and propriety of the use of the water under consideration. *Davis v. Winslow*, 51 Me. 264; *Hetrich v. Deachler*, 6 Penn. St. 32; *Prentice v. Geiger*, *supra*; *Thurber v. Martin*, 2 Gray, 394; *Gould v. Boston Duck Co.*, 13 id. 442; *Snow v. Parsons*, *supra*; Angell on Water-courses, § 140d.

5. Evidence of the uniform and general custom in like cases is competent, although of course not conclusive, upon the question whether a use is a reasonable one. Usage in such matters is some proof of what is considered a reasonable and proper use of that which is a common right, because it affords evidence of the tacit consent of all parties interested to the general convenience or necessity of such use. Of course, much would depend on the character and size of the stream and the uses to which it is adapted. Such evidence however might not be competent where the use of a navigable stream amounted to an interruption to the public right of navigation, which is always paramount to any mere private use by a riparian owner. Angell on Water-courses, § 140d, and note; *Snow v. Parsons*, *supra*; *Gould v. Boston Duck Co.*, *supra*.

6. To these rules we think we may properly add another, viz.: Whenever it appears that any use of a stream by one riparian owner interferes with the reasonable use of the stream by a lower riparian owner, to his injury, either by the interruption, diversion, abstraction, or pollution of the water, the burden of proof is upon the former to show that his use is reasonable; and the greater the injury is to the lower owner, the greater necessity for such use must the upper owner show in order to establish its reasonableness. The reasonableness of such use must determine the right, and this must depend in a great degree upon the extent of the detriment to the riparian proprietors below.

Now, in this case, there is no question but that plaintiff's use of the stream is reasonable and lawful. It is proved and found that the injury to it by defendant's mode of using the stream is very serious, amounting in one case to \$200 in seven days, or nearly \$30 per day. On the other hand, defendant shows that his mill is so

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constructed that the saw-dust and refuse cannot be otherwise disposed of, except by permitting it to fall into the stream, without practically destroying its value as a water-power mill; that owing to the construction of buildings adjacent to said mill, and the formation of the land thereabout, there is no other available method of disposing of this refuse without rendering the mill, as it now stands and is constructed, useless as such. Now, if he had gone one step further, and shown that this was a proper way in which to locate and construct a saw-mill, and that there was no other feasible and practical method of doing it, we would probably not have felt warranted in disturbing the decision of the trial court; at least, if it appeared that this stream was adapted to and useful for such saw-mill purposes. But we look in vain, either in the evidence or special findings of the court, for any thing tending to show that this mill was properly located or constructed, or that there was any necessity for locating or constructing it as it now is. In the location and construction of his mill, defendant was bound to anticipate and have regard for any reasonable use to which others might or could put the stream. For any thing that appears in the evidence, this mill could have been so constructed as to render the casting of this refuse into the water wholly unnecessary. The necessity for doing so now may be wholly the result of defendant's own wrong or negligence in constructing this mill in the manner or place he did. If so, it will not avail him to show that he cannot use the mill, as now located and constructed, in any other way.

It is true he proves, and the court finds, that it is the custom of others operating water-power saw-mills in this State to permit the saw-dust and refuse to be cast into the streams upon which the mills are erected. Even if it had appeared that this custom was uniform and well established, and prevailed under circumstances entirely like those of the present case, these facts would not necessarily have been conclusive. But when we examine the evidence, we find that it falls very short of this. It is very general and indefinite in its nature. Aside from a small mill on the Crow river, the only mills in the State mentioned where such custom has prevailed were at Watab, Anoka, and Minneapolis, all practically on the Mississippi river, where an entirely different state of things might and probably did exist. It does not appear what was the character of the streams upon which this practice obtained, nor to

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what uses they were put, nor what other interests there were to be injuriously affected by this custom. Very much would depend upon these facts; for what might be proper and admissible on one stream, used for and adapted to certain purposes, might not be proper upon another stream, of a different character, and used for entirely different purposes. Hence this evidence as to custom, although perhaps competent, was so indefinite as to be entitled to very little weight.

Subject to the limitations and modifications already stated, every man has a right to the natural flow of the water unpolluted past his land. This right cannot be taken away or essentially impaired by the use of the stream by another; at least unless such use is clearly shown to be a reasonable one. In the present case it cannot be said to be shown to be reasonable, when the only occasion or necessity for it, so far as it appears, may have resulted from the mistake or carelessness of defendant in locating and constructing his mill. Therefore, while conceding that what is a reasonable use of a stream is a question of fact, yet under the rules of law which govern the rights of riparian owners, we must hold that the finding of the court in this case, that defendant's use is a reasonable one, is not justified by the evidence.

Judgment reversed, and new trial ordered.

Judgment reversed.

TAYLOR V. MUELLER.

(30 Minn. 343.)

Sale — by sample — acceptance.

The defendants orally agreed to buy of the plaintiff two car-loads of barley by sample. The barley was in the plaintiff's elevator on a public railway track in Minneapolis leading to a point near the defendants' brewery. The defendants requested that the barley be sent down to their brewery, and the cars were sent accordingly, and the defendants inspecting the grain, and finding it inferior to the sample, refused to accept it, and so notified the plaintiff. *Held*, that there was no delivery and acceptance.

ACTION for price of barley. The opinion states the facts.
The defendants had judgment below.

J. C. Haynes, for appellant.

Wilson & Lawrence, for respondents.

VANDEBURGH, J. In May, 1881, the parties entered into a verbal agreement of sale by sample of two car-loads of barley, which plaintiff undertook to sell and deliver to defendants. The grain had been previously consigned to plaintiff, and was in cars at the time, and was deposited by him in an elevator in his own name and on his own account. The parties all resided in the city of Minneapolis, and the defendants, who were brewers, were in the habit of purchasing and receiving large quantities of barley from the plaintiff on the railway track on Second street in the city, near their brewery, whence they took it in wagons. This track was connected with the elevator for transfer and delivery of grain. The barley remained in the elevator till the latter part of July, when the defendants requested that it be sent down to Second street, where they claimed it was to be delivered. Thereafter a delivery order was furnished to the manager of the elevator, through defendants, and the cars were accordingly sent down to Second street, where defendants examined the grain and found it inferior to the sample, and unfit for their use, and they thereupon promptly rejected it and notified plaintiff of the fact. It does not appear that the defendants had any thing to do with the selection or employment of the carrier or cars in which the delivery was made, or had any control over or responsibility therefor.

The issue tried and submitted to the jury to pass upon was whether the grain was, by the contract, to be delivered at the elevator or on Second street. The plaintiff's evidence tended to show that it was agreed that the grain should be delivered at the elevator at the time he stored it there, and he insists that the sale was then completed, and his part of the contract performed; while the evidence on defendants' behalf tended to prove that the barley was to be delivered to them on Second street, where, if accepted, it might be taken conveniently to the brewery. They had not seen the grain, nor does it appear that they had any notice of its inferior condition till they examined it at the latter place. The issue as to the place agreed on for the delivery was sharply defined by the court in its charge to the jury, and they must have found thereon in favor of the defendants. From the facts attending the transfer of the

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barley from the elevator to Second street, the plaintiff contends that there was evidence of an acceptance and receipt of the grain at the elevator, and that the court erred in refusing the instruction to that effect asked by him.

Whether there was sufficient evidence of such acceptance as to warrant or support a verdict in plaintiff's favor is the principal question for our consideration. Defendants had a short time previously ordered and received at Second street two other car-loads of barley, bought in the same way. The evidence relied on as tending to prove such acceptance appears in the testimony of the manager of the elevator, a witness in plaintiff's behalf, and is as follows: "The circumstances under which I shipped the last two cars are as follows: The defendants ordered it by telephone, same as before, and gave me the number of the cars. I told them I had no order to deliver the grain to them; that I had already delivered them two cars, and that I must insist upon having a written order before delivering any more; and they got me one; that is the order upon which I sent out the last two cars, and which gave me authority to send them all out; 2,460 was one of the cars for which I had no order. So I got this order for all of them. * * * They were ordered to Second street. There is where they get at them with teams." The order was a direction to the manager to deliver to defendants the two cars previously ordered and sent, and the two cars then delivered and referred to by the witness. Except as above, and save as to previous requests by defendants of plaintiff to send the barley down to Second street, where they insisted upon having it delivered, there is no evidence of an acceptance by defendants. The evidence shows that the barley was examined by defendants the next morning after it was ordered from the elevator.

Delivery according to the terms of a written contract passes the title, but delivery under a contract invalid by the statute of frauds is at the vendor's risk. No act of the vendor alone is sufficient. *Stone v. Browning*, 68 N. Y. 598. While the grain remained in the elevator, in the name of the plaintiff, there had been neither delivery nor acceptance. The mere issuance of the delivery order did not constitute an actual delivery of the grain. It was merely a written authority to receive the possession. *Tanner v. Scovell*, 14 M. & W. 28; Benjamin on Sales (3d Am. ed.), §§ 776, 806, 815. The manager requested the order to cover past deliveries and this also, and it was accordingly issued. It would hardly be claimed that the

defendants were precluded from rejecting the former two car-loads at Second street, if found inferior to sample. Nor would it be reasonable, under the circumstances, to construe their omission to examine this grain at the elevator into a waiver or conclusive acceptance. Defendants might have gone and inspected the grain before it was put in the elevator. Doubtless they might have examined it in the elevator also; but manifestly, if as the jury have found, it was to be delivered at Second street, this was not contemplated by the parties in making the contract for the delivery of grain at that place to correspond with the sample.

Dealing with the property as owner, as by a sale, pledge or otherwise, or detention of the property, or its control beyond a reasonable time for inspection and rejection, is evidence of an acceptance. This is not, we think, shown to be the case here, upon a fair construction of the evidence. A constructive receipt by the carrier at the elevator, upon plaintiff's order, though upon defendants' request to send it to Second street, followed as it was by a reasonable inspection and rejection, because not equal to the sample, falls short of an acceptance. *Caulkins v. Hellman*, 47 N. Y. 449, 455; s. c., 7 Am. Rep. 461; *Knight v. Mann*, 120 Mass. 219. To constitute an acceptance, within the meaning of the statute, there must have been some act on the part of the defendants showing their intention to accept and appropriate the grain unconditionally as owners. *Simpson v. Crumstick*, 28 Minn. 352, 355; *Stone v. Browning*, *supra*; 5 Wait Act. & Def. 579. Now in this case, whether it be claimed that the manager of the elevator delivered the grain to the defendants, through the carrier, at Second street, and he says "the order was his authority for sending the cars out," or that he delivered it to the carrier for the defendants, in either case the defendants had not so far received the actual possession of the grain as to constitute an acceptance of the goods as satisfying the contract. Blackburn on Sales, 22-3. It is well settled that delivery to a carrier, not selected or designated by the buyer, does not constitute an acceptance within the statute. *Caulkins v. Hellman*, 47 N. Y. 449, 454; s. c., 7 Am. Rep. 461. If the buyer do not accept in person, he must do so through an unauthorized agent. *Allard v. Greasert*, 61 N. Y. 1, 6. Nor is it material that the buyer has agreed or directed that it should be sent by carrier. *Norman v. Phillips*, 14 M. & W. 277; *Frostburg Mining Co. v. N. E. Glass Co.*, 9 Cush. 115, 120; *Johnson v. Cuttle*, 105 Mass.

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447; s. c., 7 Am. Rep. 545. As they did not order or control the cars, and did not remove or disturb the grain, it was sufficient to give notice of their refusal to accept it, leaving it in the custody of the carrier on the transfer track. *Grimoldby v. Wells*, L. R., 10 C. P. 391; *Caulkins v. Hellman*, 47 N. Y. 449, 455, 456; s. c., 7 Am. Rep. 461. The distinction between a mere delivery or receipt, and an acceptance, is not to be lost sight of; and where the goods are sold by sample, that fact must be considered as an element in the case in determining whether the buyer has taken actual or constructive possession as owner, so as to indicate an acceptance thereby; and the burden of proof rests on the vendor to show the intent on the buyer's part to take possession as owner. *Remick v. Sandford*, 120 Mass. 309, 316.

If the plaintiff intended to deliver the grain at the elevator, it is manifest the defendants did not intend to accept and receive it there. And as soon as they discovered that he had not delivered what they agreed to buy, they refused to accept it. There was no understanding that the barley was to be inspected at the elevator. Considering the manifest understanding of the defendants as to the proper place of delivery and the usual course of dealing between the parties, it was not unreasonable for them to request, nor for the plaintiff to send these cars in the usual way out on a transfer track in the same city. They had a right to rely, as they unquestionably did, upon plaintiff's agreement that the bulk would correspond with the sample. No complaint is made of defendants' laches in not promptly rejecting and notifying the plaintiff after they discovered the condition of the grain. Ordinarily, it is considered a question for the jury whether the acts or conduct of the buyer amount to an acceptance. But where the undisputed facts are insufficient, as in this case, to warrant such a finding, the question would not be submitted to the jury. *Stone v. Browning*, 68 N. Y. 598, 601-2; *Ham v. Van Orden*, 4 Hun, 709; *Shepherd v. Pressey*, 32 N. H. 49, 56-7. Here, we think, the defendants, in good faith, were seeking a delivery of the grain purchased by them, and their act in procuring the delivery order, under the circumstances, in ignorance of its condition, had reference solely to its delivery, and was not a decisive and unequivocal act of acceptance thereof as owner. 5 Wait Act. & Def. 598, and cases cited. In *Morton v. Tibbett*, 15 Q. B. 428, relied on by plaintiff's counsel, the defendant himself sent a carrier for the grain purchased by sample,

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and previous to its arrival resold it by the same sample, before he had inspected it ; and it was held that its receipt by the carrier was not an acceptance, but that his resale of it was evidence of an acceptance. *Frostburg Mining Co. v. N. E. Glass Co.*, 9 Cosh. 115, 120 ; *Johnson v. Cuttle*, *supra*.

[Minor matter omitted.]

Order affirmed.

CASES

IN 1883

SUPREME COURT OF ERRORS

OF

CONNECTICUT.

BALDWIN V. ENSIGN.

(49 Conn. 118.)

Nuisance — horse at large on highway.

A horse unlawfully at large on a highway is a nuisance, and its owner is liable for any damage done by it, whether the animal is vicious or not.

TRESPASS on the case for a personal injury by a colt. The opinion shows the facts. The plaintiff had judgment below.

C. B. Andrews and *D. C. Kilbourn*, for plaintiff in error.

H. B. Graves and *G. A. Hickox*, for defendant in error.

CARPENTER, J. The defendant let loose a mare and colt belonging to him upon the public highway, not keeping any watch or guard over them. The plaintiff, a child about three years old, was near his father's house when he was injured by the colt, but whether it occurred within or without the highway does not distinctly appear, although we think it may be fairly inferred that he was in the highway outside of the travelled path. The committee by

whom the facts were found, says: "I do not find that the colt was vicious, or, if so, that such viciousness was known to the defendant."

If the injury had been received outside of the highway we think the case would have been within *Barnum v. Vandusen*, 16 Conn. 200. That was an action of trespass to land by the defendant's sheep. It was alleged as special damage that they imparted to the plaintiff's sheep a contagious disease, of which some of them died. The *scienter* was not alleged, but the plaintiff was allowed to prove on the trial, to enhance damages, that the defendant knew that his sheep were diseased. One claim made was that the plaintiff could not recover the special damage alleged without proof of such knowledge, and that inasmuch as knowledge was not averred, there could be no recovery for that cause. The court held otherwise. HINMAN, J., says: "The principle that the owner of a domestic animal, not naturally inclined to commit mischief, is not liable for an injury committed by it, unless he has notice that such animal is accustomed to commit mischief, though undoubted when properly applied, yet has no application to this case. If the defendant's sheep had communicated a disease to the plaintiff's, while rightfully upon the plaintiff's land, or in an adjoining inclosure, the principle and the authorities cited in support of it, might have applied." It is true that the special damage was shown in that case as matter of aggravation, but the case shows that the defendant was liable for such damage without proof of knowledge, and the ground of the liability was that the sheep were unlawfully on the plaintiff's land.

Let us go one step further and suppose that the plaintiff owned the land where this accident happened, and had brought an action of trespass to the land, alleging the injury to his person as special damage. In that event *Barnum v. Vandusen* would have governed this case, unless it could be successfully claimed that the damage was too remote; which could not well be done, as the damage in this case is as much the natural and probable consequence of the trespass as it was in that. Nor can it be doubted that he could in that event have brought case for the injury to his person. In *Barnum v. Vandusen* the late Chief Justice SEYMOUR, then at the bar, in arguing the case for the defendant, conceding that an action would lie for the injury aside from the trespass, contended that a separate action should have been brought and that no recovery

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could be had in that action for the special damage. But the ownership of the land is not important. The accidental circumstance that the plaintiff did not own it cannot deprive him of his remedy.

It only remains to inquire whether the fact that the accident happened in the limits of the highway can change the result. Why should it? The plaintiff had a lawful right to be there, as much so as to be on his own land; and the colt was unlawfully there. It is true he was not trespassing upon a private inclosure, but he was at large on the highway, contrary to law, and as such was a nuisance. "Any thing that worketh hurt, inconvenience or damage" is a nuisance, according to Blackstone; and when it "worketh hurt, inconvenience or damage" to an individual, the party injured has his action against the author of the nuisance.

The propensity of colts and of horses generally when at liberty in the highway to run and gambol, and to annoy and excite other horses, and their liability to cause damage in various ways, are so well known that they need only be mentioned. That such animals in such circumstances may be nuisances is a proposition requiring no argument to sustain it.

The ground of liability for injuries of this kind is negligence; and ordinarily where there is no negligence there is no liability. It is the duty of a man who owns a vicious animal to give notice of his propensity or to restrain him; his omission to do so is negligence, which makes him liable for the consequences. If the animal is not accustomed to do mischief and is where he rightfully belongs and does an injury, there is no negligence and no liability. But if he allows him to trespass on others, or if he knowingly suffers him to be where he has no legal right to be, that is negligence; and if the natural and probable consequence is injury to others, he is liable. In this case the plaintiff was injured without fault or negligence on his part; the injury was the result indirectly but not too remotely of the defendant's negligence; if the defendant is not liable it is an anomalous case.

Thus upon principle, and without reference to authorities, except the case in our own State, it would seem that the defendant is liable without showing that the animal was vicious, or, if vicious, that he was known to be so; and that the fact that the injury was received in the highway does not relieve him of his liability.

It will be observed that we have laid no stress upon the circum-

stance that the colt when he inflicted the injury might be regarded as trespassing upon real estate, nor upon the fact that the natural playfulness of such an animal may be under some circumstances as dangerous as a positive vice.

If we turn our attention to the authorities elsewhere we think that they abundantly sustain our position.

In *Decker v. Gammon*, 44 Me. 322, the court say: "The owner of domestic animals, if they are wrongfully in the place where they do any mischief, is liable for it, though he had no notice that they had been accustomed to do so before. In cases of this kind the ground of the action is that the animals were wrongfully in the place where the injury was done, and it is not necessary to allege or prove any knowledge on the part of the owner that they had previously been vicious."

In *Barnes v. Chapin*, 4 Allen, 444, a sucking colt while following its dam, which was led by her owner in a highway, was kicked and killed by a horse, which had been turned loose in the highway without a keeper. The owner was held liable. CHAPMAN, J., said: "The general doctrine of the common law as to injuries done by domestic animals seems to be, that the owner is not liable unless he has been in some fault. * * As to the defendant, it appears that he was in fault in permitting his mare to go at large on the highway without a keeper. Highways are dedicated to the use of travellers. In this Commonwealth it has long been regarded as inconsistent with the safety and convenience of travellers to permit horses to go at large on the highway; and such an act is an offense against our statutes. As the plaintiff was using reasonable care, and as the defendant's fault concurred with the act of his animal in causing the injury to the plaintiff's property, the action is well maintained." See also *Lyons v. Merrick*, 105 Mass. 76.

In Moak's *Underhill on Torts*, pages 296, 297, it is said that "the owner of a horse which he knows to be vicious is liable for injuries inflicted by him while upon the owner's land which is open to the public. The owner is also liable, though he does not know the horse to be vicious, if he turns him loose to go on such open land in so negligent a manner as to endanger the safety of persons passing across it." Citing *Southall v. Jones*, 5 Vict. L. R. 402.

In *Cox v. Burbridge*, 13 C. B. (N. S.) 430, a case relied on by the defendant, the head-note is as follows: "The defendant's horse being on a highway, kicked the plaintiff, a child, who was

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playing there. There was no evidence to show how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick. *Held*, no evidence from which the jury would be justified in inferring that the defendant had been guilty of an actionable negligence." In this case it appears that the mare and colt were on the highway through the fault of the defendant.

In *Lee v. Riley*, 18 C. B. (N. S.) 722, the defendant's horse escaped in consequence of a defect in the fence which it was his duty to repair, and strayed on to the plaintiff's premises and kicked his horse, by reason of which it had to be killed. The defendant was held liable, not on the ground that his horse was vicious and he knew it, but on the ground of negligence in allowing the horse to escape from his inclosure. BYLES, J., said: "I can see but little difference between placing a horse with 'caulkings,' such as are described in this case, in a field with insufficient fences, and turning a horse on a common so armed as to be dangerous to other horses, in which latter case the defendant would undoubtedly be responsible for the consequences of his so doing."

In New York and Pennsylvania the owners of horses are held liable for damages done by them while at large in the streets of a populous city. *Dickson v. McCoy*, 39 N. Y. 400; *Goodman v. Gay*, 15 Penn. St. 188.

In *Fallon v. O'Brien*, 12 R. I. 518, the court (s. c., 34 Am. Rep. 713), following the decisions in New York and Pennsylvania, held that if a horse was at large in the streets of Providence through any negligence of the owner and did damage, the owner was liable. Otherwise if at large without the owner's fault.

Whether any well-grounded distinction can be taken between the streets in a city and highways in the country is a question. The difference is mainly the difference in the degree of danger. The danger is obviously greater in the former than in the latter; and yet that there is danger in the country is well illustrated by this case; and wherever the danger is there the protection is needed. If there are not so many people in the country highways there are likely to be more loose horses. In either place such horses are likely to do harm; and when harm is done, whether in the one place or the other, the owner, if negligent, should be responsible.

There is no error in the judgment of the court below.

In this opinion the other judges concurred.

FUNK V. GALLIVAN.

(29 Conn. 124.)

Lottery — action for chattel drawn in.

Lotteries being declared illegal by statute, no action lies for the recovery of a chattel in favor of one who claims to have drawn it in a lottery, as against another who has possession of it under the like claim.

TROVER. The opinion states the case. The plaintiff had judgment below.

F. E. Cleaveland, for defendant

C. B. Andrews and *A. T. Roraback*, contra.

LOOMIS, J. The plaintiff by an action of trover seeks to recover of the defendant the value of a sewing machine, conceded to be in the defendant's possession, and which he refused to give up on demand before the suit was brought. It is conceded that the machine on the 7th of November, 1879, was the property of one Comstock, who, to repair a pecuniary loss by fire, undertook at the suggestion of friends to dispose of the machine by the sale of lottery tickets. The machine was left at the hotel of one Ricker, and the drawing took place there in the absence of the parties to this suit. Ticket No. 41 drew the machine. The plaintiff offered evidence, which was not objected to, to show that he purchased ticket No. 41, and the defendant No. 39, and that the defendant without authority or color of right took away the machine, after the drawing, from the hotel. The plaintiff also offered in evidence a bill of sale from Comstock to him, duly executed under seal dated the 9th day of November, 1879. The defendant on his part offered certain evidence to the jury tending to prove that he had ticket No. 41. The court received this subject to the plaintiff's objection, to be ruled upon in the charge.

The defendant made sundry requests of the court to charge the jury. The second request will be sufficient to present the controlling questions in the case. It was as follows :

"If the jury finds that said machine was disposed of by any kind of lottery, chance or hazard, and in consequence thereof

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came into the hands of the defendant Gallivan, then Comstock had no right to said machine which he could enforce at law ; and as he could convey nothing which he did not himself possess, the plaintiff Funk has no right that he can enforce at law, and your verdict should be for the defendant."

The court in charging the jury excluded from their consideration all evidence offered by the defendant tending to show that he had ticket No. 41, and the requests of the defendant to charge were denied or not complied with.

The charge as given seems consistent with the idea upon which the court excluded all evidence to show that the defendant obtained possession of the machine from the person having it in custody, upon his presentation of ticket No. 41, which drew the prize. This left the defendant before the jury in the position of a wanton trespasser, attempting to relieve that position a little by showing that Comstock, the former owner, and the plaintiff were engaged in a lottery and could not sue even a trespasser who had taken away the property thus staked in the lottery. And the argument of counsel before this court was founded largely on these premises.

If the record required us to accept such a view of the case a very different question would be presented — a question however which we do not now feel called upon to discuss. But for the purpose of determining whether a party is entitled to a new trial for evidence offered and excluded by the court, we are obliged to assume that he was able to prove what he offered to prove. Assuming then that the defendant might have proved, if allowed, that through the purchase of the ticket in the lottery he obtained possession of the machine, would it have been a good defense ?

There is no doubt that the disposal of the machine by Comstock by the drawing mentioned in the record was a disposal by chance or hazard, within the meaning of section 4, chapter 9, title 20, page 516 of the General Statutes.

It is equally clear as a proposition of law that "every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." *Bartlett v. Vinor*, Carthew, 252.

It follows that neither the courts of law nor of equity will interpose to enforce such a contract while executory, nor to rescind it and recover back the consideration when executed ; but if both parties are *in pari delicto* the law leaves them where it finds them.

The court below apprehended and correctly states the principle, but in applying it cut off the defendant from showing that he obtained possession by the execution of this illegal contract on the part of the owner of the machine.

At first blush it might seem unequal, and therefore unjust, to give the defendant the privilege of setting up his own participation in the illegal contract, resulting in his gain, and deny the privilege to the plaintiff, to his loss. Lord MANSFIELD, in *Holman v. Johnson*, 1 Cow. 343, alluded to such a suggestion, which he stated and answered as follows : "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake however that the objection is ever allowed, but is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say."

The law could not take any other position than that it will not lend its aid to either of the parties to an immoral or illegal transaction, but will leave them as it finds them ; but to be consistent with this position it is necessary to give to either party the right to plead or prove the true nature of the transaction in bar to an action founded upon it. And such is the well-established doctrine. *Bettis v. Reynolds*, 12 Ired. 344 ; *Brown v. Watson*, 6 B. Monr. 588 ; *Bevil v. Hix*, 12 id. 143 ; *Heineman v. Newman*, 55 Ga. 262 ; s. c., 21 Am. Rep. 279.

We know of no clearer exposition of the law on this subject than that contained in the opinion of WELLS, J., in *Myers v. Meinrath*, 101 Mass. 368 ; s. c., 3 Am. Rep. 368, which we will adopt as entirely applicable to the case at bar. In the case cited the action was for a chattel sold and delivered in exchange for another chattel on the Lord's day, which the defendant retained, notwithstanding the return by the plaintiff of the chattel for which it was exchanged and his demand for a corresponding return by the defendant. It was held that the plaintiff could not recover, and the reasons for the decision were as follows : "That contracts made on the Lord's day are illegal ; that no action based upon such a

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contract can be maintained in a court of law or equity, either to enforce its obligations or to secure its fruits, in favor of either party, are propositions settled beyond controversy. But such contracts are not altogether inoperative. They may be executed by the parties, and then the same principle of public policy which leads courts to refuse to act, when called upon to enforce them, will prevent the court from acting to relieve either party from the consequences of the illegal transaction. They may indirectly give effect to the executed illegal contract. The purpose of the rule of law however is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of or relief from their illegal contract. In such cases the defense of illegality prevails, not as a protection to the defendant, but as a disability in the plaintiff. Upon this principle possession acquired from an illegal transaction, or by a contract fully executed, will often avail the party holding it as a sufficient title. Neither party is allowed to impeach its validity by asserting the illegality of his own act. The transaction takes effect from the disability of the parties to assert any right to the contrary. The court does not give it effect, but simply refuses its aid to undo what the parties have already done."

For these reasons we think the court should have allowed the jury to consider the evidence offered by the defendant, and such evidence being received, the court should have charged the jury substantially as requested in the second request of the defendant and in accordance with the principles before stated.

A new trial is advised.

In this opinion the other judges concurred.

SEELEY V. TOWN OF LITCHFIELD.

(40 Conn. 124.)

Municipal corporation — duty of town as to snow in highway — custom.

A town is not required to keep the entire surface between the fences of a highway free from snow-drifts, nor to clear the drifts from the track usually travelled in the summer; but it is sufficient if there is a reasonably safe and convenient path anywhere within the limits.

The custom of the inhabitants of Connecticut towns to join and break paths through the snow in highways is ancient, general and reasonable, and excuses the selectmen from action in ordinary cases.

of this road, and it does not seem to have occurred to any one that there was any thing in the case making it necessary to call their attention to it.

The question before the jury was whether the road at this point was in a reasonably safe condition, and whether the selectmen are justly chargeable with negligence or want of reasonable care in reference to it. *Congdon v. Norwich*, 37 Conn. 414. Now the defendants did not directly and specifically call the attention of the court to this limited duty and to the circumstances limiting it and ask the court to apply the law to the case. They asked in the first place that the court would say as matter of law that the town was not negligent, which of course could not properly be done. *Congdon v. Norwich, supra*. They then asked that the court would say to the jury that the town was not bound to keep the whole space between the fences of the highway suitable for travel, but that an open passage-way was all that was required. We do not think the court was bound to say that without qualification, as manifestly the open way must be reasonably safe and convenient. With this qualification we see no objection to the request.

We also think that the request relating to the line of travel was pertinent to the case and proper as far as it went. There was evidence that the line of winter travel deflected from the summer path, causing a curve in the track which materially contributed to the injury, as it is claimed. We think it is true that the town is not in all cases bound to follow the travelled path in clearing the road of snow ; and we think the court should have said so to the jury, and then applied the general proposition to the evidence and left it to the jury to say under the circumstances whether there was negligence in this respect.

From the charge it appears that the court did not allude to the qualified nature of the defendant's duty in respect to snow, but treated the case as though the defect complained of was an ordinary structural defect, or an obstruction caused by placing some more substantial material upon the highway, which clearly both law and custom required the selectmen to remove or repair as the case might be. Thus the jury were left to infer that the same care and diligence were required of the selectmen in this case that are required of them in all cases. Hence it is possible, if the jury had had their attention called by the court to this limited duty and to the facts and circumstances limiting and qualifying it, and had

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been asked to say whether under all the circumstances the selectmen had neglected any duty devolving upon them, that the result would have been different.

We are somewhat embarrassed by the fact that the defendants' requests as legal propositions are objectionable or require qualification. As a rule, to entitle a party to a new trial for the refusal of the court to charge as requested, the request should be so framed that the court can properly comply with it. But there may be exceptions to that rule, and there should be an exception when the request relates to a material and important feature of the case concerning which it is clearly the duty of the court to instruct the jury irrespective of the request. If in such cases the court not only refuses to instruct them as requested, but entirely omits all reference to the subject, thereby leaving the jury to have, and to act upon, erroneous impressions of the law, we think the party is entitled to a new trial, notwithstanding the imperfect manner of making the request. All the requests to which we have alluded seem to be based on, and to have reference to, this limited duty and qualified responsibility, and while it was not the duty of the court to charge precisely as requested, yet it was its duty to respond to the request by charging the jury correctly on that subject. The failure to do so very likely left the jury with the impression that the law was so contrary to the claim of the defendants, that it was the duty of the town "to make a road over or through snow-drifts in the same line with that of the travelled path in summer," and "to make the winter road straight." The omission under the circumstances was calculated to mislead the jury to the prejudice of the defendants, which entitles them to a new trial.

In this opinion the other judges concurred.

LEWIS V. MCCABE.

(49 Conn. 140.)

Sale — conditional — attaching creditors.

Where chattels are sold and delivered on condition that title is not to pass until they are paid for, an attaching creditor of the vendee can acquire no right superior to the vendor's right.*

* See *Summer v. Woods* (97 Ala. 129), 42 Am. Rep. 104.

of this road, and it does not seem to have occurred to any one that there was any thing in the case making it necessary to call their attention to it.

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* See *Summer v. Woods* (37 Ala. 120), 43 Am. Rep. 104.

SUBMISSION on agreed facts. The head-note shows the point. The defendant had judgment below.

F. L. Hungerford, for plaintiffs.

J. Walsh, for defendants.

LOOMIS, J. There is much contrariety of reasoning and decision relative to the validity of what are called conditional sales in different States, and often to some extent in the same State.

The courts of Pennsylvania have most firmly established the rule that a sale and delivery of personal property with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, is fraudulent and void as to creditors of the vendee and innocent purchasers; but they are obliged to except cases of bailment where no present contract of sale is regarded as made, and they have often found difficulty in distinguishing between cases that lie near the border line separating sales from bailments, where there is a condition upon which the bailee may become the owner.

See *Stadtfield v. Huntsman*, 92 Penn. St. 53; s. c., 37 Am. Rep. 661, decided in January, 1880, and *Brunswick v. Hoover*, decided in November, 1880, reported in the Albany Law Journal, Vol. 24, No. 10, pages 185 to 187, and cases there cited.*

The courts of New York seem to concur with those of Pennsylvania in holding conditional sales void as to purchasers (*Steelyards v. Sanger*, 2 Hilt. 96; *Smith v. Lynes*, 1 Seld. 41; *Haggarty v. Palmer*, 6 Johns. Ch. 437), but differ in giving effect to them against levies made by creditors and assignments in trust or as security for the payment of antecedent debts. *Haggarty v. Palmer* and *Smith v. Lynes*, *supra*; *Keeler v. Field*, 1 Paige, 312; *Herring v. Hoppock*, 15 N. Y. 409; *Beaven v. Lane*, 6 Duer, 232; *Wait v. Green*, 35 Barb. 585. But when the agreement confers on the conditional vendee the right to sell, or a right inconsistent with continued ownership of the original vendor, the courts of New York pronounce the transaction fraudulent as against both creditors and purchasers. *Ludden v. Hazen*, 31 Barb. 650; *Bonesteel v. Flack*, 41 id. 435; *Powell v. Preston*, 1 Hun, 513.

In Maine, Vermont and Massachusetts the condition that the right of property shall remain in the vendor until payment is held

* See note, 37 Am. Rep. 664.

good not only as between the original parties, but also against purchasers from the vendee and creditors of the latter, even when possession goes with the sale, and there is nothing to indicate that it is not absolute. In all the cases of this class that have hitherto been considered by this court, the court has uniformly and consistently applied the principle embodied in the ancient maxim, "that when a man hath a thing he may condition with it as he will." 1 Shep. Touch. 118.

In the leading case of *Forbes v. Marsh*, 15 Conn. 384, WILLIAMS, Ch. J., in delivering the opinion, cited several cases decided by the courts of Massachusetts, and added: "It is claimed however that these and many other cases of a similar character are peculiar to that State. The court think otherwise, and that they are based upon the principle of the common law, which construes contracts according to the intention of the parties, and allows men to contract according to their own pleasure, unless contrary to the policy of the law or certain technical rules. The owner may dispose of his property to whomsoever he pleases, at any time and in any manner. 2 Bl. Com. 447. When he relies upon his remedy it is but just that he should be left to it according to agreement, but on the contrary there is no reason why a man should be forced to trust where he never meant it. Per HOLT, Ch. J., in *Thorpe v. Thorpe*, 1 Salk. 171. For the agreement of the minds of the parties is the only thing the law respects in contracts. Plowd. C. 140. * * * The rule of law making the property of one man liable for the debts of others in whose hands it is found is applicable particularly to that property which was once owned by the possessor, and is by him sold or mortgaged to another, and then suffered to remain in his possession. In such cases possession is evidence of fraud, because there is not given to the world the usual evidence of a change of title. The vendor or mortgagor is therefore presumed to remain owner of the property as before. It is otherwise in cases like that before us. The vendee comes into possession of property which was known to belong to another man. Whether therefore the vendee had borrowed it, or hired it, or purchased it, becomes a matter of inquiry, and ought to be ascertained by him who proposes to trust his property upon the faith of this appearance; for the law offers its protecting shield to those who attempt to protect themselves. Accordingly we find that all these cases of conditional sales made *bona fide* have been held good as against attaching creditors as well as against the parties."

The doctrine of this case has been reaffirmed in *Hart v. Carpenter*, 24 Conn. 424; *Tomlinson v. Roberts*, 25 id. 477; *Cragin v. Coe*, 29 id. 51; *Hughes v. Kelly*, 40 id. 148, and *Brown v. Fitch*, 43 id. 512.

But it must be observed that these cases, while firmly sustaining the condition and protecting the title of the original vendor against all other parties, do not directly involve the precise question now presented. Those cases are all distinguishable from this in two particulars, the property was of a nature not necessarily to be consumed in the use, and there was no sort of concession on the part of the original vendor that the conditional vendee might dispose of the property without first paying the price agreed upon. Both these elements, to some extent at least, exist in the present case, and occasion hesitation on the part of the court as to the validity of the condition as against the creditors of McAvoy.

The finding bearing upon the question is as follows: "It was an express condition of both sales that the title to the merchandise should not vest in the vendee until it was fully paid for, and until such payments were made the title was to remain in the vendors. * * * Said McAvoy is a retailer of liquors, and it was supposed by the parties that the merchandise would be used in his business, and in case any of it should have been sold and consumed before the conditions of sale were complied with, the vendors could only enforce their conditions against such portion as might remain unsold."

Under such an agreement, after the property has been attached by creditors, will the law consider it as belonging to the plaintiffs or to their conditional vendee, McAvoy?

If we invoke the aid of the courts of other States to give an answer to this question, we find decisions of the highest courts of Maine, Vermont and Massachusetts, protecting the title of the original vendor under agreements substantially the same as the one we are considering.

In *Rogers v. Whitehouse*, 71 Me. 222, goods were bought by a retail trader upon condition that the property should not vest in him until they were fully paid for, but with an understanding between the parties that they were to go into the store of the conditional purchaser and be sold by him in the regular course of trade; and it was held that they did not pass to the assignee in insolvency of the latter for the benefit of his creditors, although the original

vendor would have been estopped to deny the title of those who might purchase portions of them of the retailer in the regular course of his business, and it was distinctly held that it was not essential to the existence and validity of such a condition that the conditional vendee should have no right to sell to others. BARROWS, J., in giving the opinion said: "We see no legal objection to a wholesale dealer making a conditional sale to a retailer with the understanding that he may dispose of the goods as they may be called for at retail, but that as between themselves the property shall not pass until the goods are paid for, and in such case, while the purchaser at retail would get a title which the original vendor could not impeach because of his agreement with the retailer, it would be the title of the original vendor, and not that of the retailer, who has none and can convey none except in the manner which his arrangement with the vendor permits."

In *Armstrong v. Houston*, 38 Vt. 448, the plaintiff sold one Thompson provisions on condition, made in good faith, that they were to remain the property of the plaintiff until paid for, but with the understanding that Thompson might consume them in his family. The defendant, a constable, attached the provisions in behalf of a creditor of Thompson. *Held*, that the condition was valid, and the title to the goods remained in the plaintiff until they were paid for or consumed. KELLOGG, J., in delivering the opinion of the court, said: "It was the unquestionable right of the plaintiff to sell this property to Thompson upon the condition that until payment of the price property should remain the plaintiffs. The retention of the title to the property is not a fraud upon any person, and such a contract is one which every person has a right to make. In a conditional sale the possession of the property is ordinarily transferred to the vendee, and very frequently with expectation of both of the parties to the sale that the property will be used by the vendee; but in such cases the vendee is, until the performance of the condition, only a bailee of the property for a specific purpose, and he acquires no property in the goods from the possession merely. His right rests upon the agreement of the parties, and their intention in making the contract of sale is to be carried into effect if the transaction was entered into in good faith, unless the contract is one which contravenes some established rule of law."

Of the Massachusetts cases the one most in point is *Burbank v.*

Crooker, 7 Gray, 158, where there was a sale and delivery of a stock of goods to a shopkeeper to be put into his shop for sale, but upon condition that the title should not vest in him until payment of the price, and it was held that the title did not pass, and that the condition was operative as against even a purchaser from him of the whole stock of goods; although it was also held that had a sale been made of individual articles in the ordinary course of business in a country store, the plaintiff might have been estopped to assert any right adverse to such purchaser, having placed them in the hands of such dealer with the understanding that they were to be thus used.

The New York cases already referred to render it probable that the courts of that State would declare such a condition inoperative, although there is a distinction of some significance between the case of *Ludden v. Hazen*, on which the defendant relies, and the case at bar, in this — that in the former the vendee, to use the language of the court, was to “run his unlicensed grocery upon borrowed whisky,” all of which by the terms of the agreement was to be paid for only when sold — showing that a sale by the groceryman was the most prominent part of the contract. In so flagrant a case it might well be held that the condition was colorable, fraudulent and void. We concede however that the reasoning contained in the opinion renders it probable that the contract we are considering would in that State be declared void against purchasers and creditors.

The finding in the case now under consideration leaves it a little in doubt how far the parties contemplated any use of the liquors in McAvoy's business until paid for by him; and it appears that although he had had possession for several months, yet all the packages remained intact except one, which was opened and a small quantity drawn therefrom a day or two before the attachment, and on the day after the attachment full payment was intended to be made to the agent, who was then expected in New Britain.

But conceding that the parties actually contemplated that there might be some sales made before actual payment of the price, yet the terms of the agreement, coupled with the conduct of the conditional vendee in pursuance of it, evince the perfect good faith and *bona fide* character of the transaction, so that it cannot be pronounced void on account of any wrong intent of the parties. If

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therefore the condition is to be held inoperative at all, the law must so declare it upon grounds of public policy, because it was calculated to give the one clothed with the possession a false credit, or else upon the ground that the plaintiffs through their contract are to be regarded as holding the possessor, or conditional vendee, out to the world as absolute owner.

The objection as to giving a false credit has undoubtedly much force, so that in several States the courts consider it as sufficient, but it applies with more or less strength according to the circumstances to all cases of conditional sales where the vendee is clothed with full possession and apparent ownership; but as the court says in *Forbes v. March, supra*, in this State, "all these cases of conditional sales made *bona fide* have been held good against attaching creditors," and in reply to the objection we are considering, it warns persons against putting faith in appearances except where the case comes within the rule of the vendor's retaining possession after the sale, and persons about to give credit on the faith of such appearances must make inquiry; and in this respect the language of our courts is similar to that of CAMPBELL, J., in giving the opinion in *Ketchum v. Brennan*. 53 Miss. 596: "A buyer must beware of purchasing from one who has no title; possession is not title."

The other objection, as to holding out the possessor to the world as absolute owner, is involved partly in the one just considered, except so far as the contract in question must be construed as contemplating or authorizing a sale by the possessor.

Possession, with the *jus disponendi* added, has been regarded by many courts as a sufficient reason for declaring a contract colorable and fraudulent without regard to the real intent of the parties. Bump on Fraudulent Conveyances, 123, and cases there referred to.

We concede that there is much force in the reasoning supporting such a rule, but at the same time we must bear in mind the spirit and drift of our own decisions as they may have induced the making of such contracts. While it is true, as already stated, that no case identical with the present in the particular feature we are now considering has hitherto been before this court, yet the cases referred to clearly show that the controlling consideration has been the *bona fide* character of the transaction and the honest meaning and intent of the parties, without applying any technical rule of

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public policy, as in the cases of a retention of possession by the vendor after a sale.

The courts of Massachusetts and Connecticut have always been in harmony on this vexed subject, and the principles hitherto adopted by us, if they do not logically compel, yet very naturally lead to the same result as already reached in that State, where the title of the original vendor has been protected notwithstanding the objection we are considering.

If however the contract in question must be construed to mean that the plaintiff authorized McAvoy to sell the property as his own, we should be constrained to hold it so absolutely inconsistent with the retention of the title in the plaintiff as to waive or make void the condition. But in this case the condition that no title was to pass until payment is so clear, express and positive in its terms that we are inclined to give it full effect, and to construe what is afterward said of the understanding of the parties relative to a sale as the court in *Rogers v. Whitehouse*, *supra*, did, that is, not as authority to sell as his own (having nothing himself) but as authority simply to transfer the title of the plaintiff in the manner authorized.

The discussion, so far, implies that we consider that the validity of the contract in question should be determined by the laws of this State ; but we ought perhaps to refer particularly to the claim made in behalf of the defendants, that "the negotiations for the sale, although carried on by the plaintiffs' agent in New Britain, required the assent of the plaintiffs in New York to complete the contract," and that therefore it must be considered as there made.

We think the claim thus stated is based on a partial statement of the facts. But if we supply the omission by reference to the finding, that says "the sales were made at New Britain," that payment was to be there made to the plaintiffs' agent, and that "all the merchandise was immediately after the respective sales placed in the possession of McAvoy at New Britain," it will become clear that the transaction is to be governed by the laws of this State.

There was error in the judgment complained of and it is reversed.

Judgment reversed.

In this opinion the other judges concurred ; except CARPENTER, J., who dissented.

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(40 Conn. 191.)

Mortgage — assumption by grantee.

Where a grantee of mortgaged premises agrees with the grantor, mortgagor, to pay the mortgage, no right of action accrues to the mortgagee on the promise. (*See note, p. 232.*)

ACTION against grantee of mortgaged premises to recover deficiency on foreclosure. The opinion states the case.

F. H. Parker, for plaintiff.

H. S. Barbour and *C. Lounsbury*, for defendant.

CARPENTER, J. The plaintiffs held a mortgage on real estate. The defendant purchased the equity of redemption, agreeing with the mortgagor to pay the mortgage debt. Subsequently the mortgage was foreclosed — the property then being worth less than the mortgage debt—leaving a balance unpaid. This action is brought to recover the balance. The promise was not assigned to the plaintiffs but was discharged by the mortgagor before suit brought. The question of the defendant's liability is reserved for the advice of this court.

The case differs from the other cases on this subject that have heretofore been before this court. We now have the naked question whether the owner of a debt secured by mortgage may maintain an action on the promise made by the purchaser of the equity of redemption to the mortgagor to pay the debt without an assignment of the right of action which that promise gives.

As a rule actions on contracts can be brought only by him with whom the contract was made and from whom the consideration moved. The legal title is deemed to be in him alone and strangers to the contract cannot sue. The rule is a salutary one and should not be departed from except for good reasons. There are however some exceptions to it. Actions of assumpsit may be maintained in some instances where there is no express contract with the plaintiff and where the consideration does not move from him. If A. receives money from B. to be paid to C., C. may maintain an action against

A. These cases however are exceptions only in appearance. They in fact recognize the general rule and are really within it ; for the action is not brought on the express promise by A. to B., but on an implied promise by A. to pay the money to C.

Another class of exceptions is where the contract has for its object a benefit to a third party and is made with that intent. Some early English cases in which promises were made to a father or uncle for the benefit of a child or nephew are instances of this class. There may also be cases in which a third party may have some peculiar equity in the subject-matter of a contract which will enable him to maintain a bill in equity to enforce it.

Does this case fall within any exception recognized by authority and supported by principle ?

Before alluding to decided cases let us examine the case with some care in the light of the circumstances, for the purpose of discovering just what the intention of the parties was and precisely what the defendant promised to do ; for courts always in enforcing contracts intend to give effect to the intention of the parties ; and when that intention is discovered in respect to a legal and valid contract it is the inflexible and imperative law of the case. And it is a necessary part of the rule itself that the courts will not so construe and enforce a contract as to bring about a result not expressed in the contract and not intended by the parties.

What was the transaction ? It was not a sale of a piece of land for a fixed price, equal to the value of the land, so as to create a debt for that sum ; but was simply a sale of the equity of redemption. The distinction between the land, unincumbered, and the equity of redemption, is obvious enough, and is an important one, as on it depend in a great degree the rights and obligations of the parties. The defendant purchased the equity of redemption. The finding is that the mortgagor "conveyed to the defendant said real estate subject to said mortgage." So that the only debt brought into existence by the transaction was the price agreed to be paid for the equity of redemption. The mere purchase raised no debt to the mortgagor which the defendant was to discharge by paying the incumbrance. By the contract of assumption he obliged himself to the mortgagor to pay the mortgage debt. Whether that raised any personal obligation to the mortgagee is the question in the case. If the probable intention of the parties is to govern it is difficult to find any such liability in the transaction. The mort-

gagee was not a party to it, no part of the consideration moved from him, and he was in no worse condition because of it. He still had the security of the land and the personal responsibility of the mortgagor, and that is all he contracted for or required. The parties contracted with reference to their own interests, not his ; to benefit themselves, not him. He had no legal or equitable interest in the contract and there is no room for the presumption that it was intended for his benefit.

There was no agency, express or implied. The mortgagor would doubtless be surprised at the suggestion, should it be made, that he was acting as the agent of the mortgagee. There was no substitution or novation, for that requires three parties, and here were only two ; besides the original debtor was not discharged.

It was not the object of the parties to give the mortgagee additional security ; and to interpret it in that sense is to give it a force and meaning never contemplated by the parties, and is in effect making a contract for them. The only contract which they made was simply this, the defendant agreed that he would pay the mortgagor's debt. The promisee alone had the legal and equitable interest. It follows that he alone can enforce it unless he imparts that right to others. That he may sue will not be disputed. If the mortgagee has that right by force of the contract, then two persons wholly independent of each other have an equal right. If either may sue both may, and a suit by one will not abate or bar a suit by the other ; and a discharge by one for any cause short of a fulfillment will not discharge the contract. Thus the promisor may be harassed with two suits at the same time on the same contract, and if he would compromise with the promisee he must obtain the consent of a stranger. If this is the law it is an anomaly, for another instance of the kind is hardly to be found in the whole range of jurisprudence.

We are aware that there are decisions from courts of the highest authority, and whose opinions are entitled to the highest respect, which hold that the creditor may sue on such contracts ; perhaps it is not too much to say that the prevailing current of authority in this country is in that direction ; but believing as we do that they are not founded in good reason or sound policy we cannot accept them as law. The question is an open one in this State, and principle, rather than precedents not founded in principle, should determine it.

We cannot undertake to examine in detail the cases alluded to; we can only refer in a general way to the reasoning by which they are supported. It is interesting to note the various grounds on which they stand, some of which are not only weak in themselves, but fail to strengthen the others. It is an argument of no little weight against the correctness of decisions that they seem to require disconnected and inharmonious reasons to sustain them.

Some of the cases seem to proceed "upon the broad principle that if one person makes a promise to another, for the benefit of a third person, that third person may maintain an action on the promise;" and that without regard to the question whether the benefit to a third person was the principal thing intended or was a mere incident. *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 id. 178; *Thorp v. Keokuk Coal Co.*, 48 id. 253; *Davis v. Calloway*, 30 Ind. 112.

In cases of this class the reasoning is not uniform. In some it is suggested that from the express promise to the promisee the law implies a promise to the third person. In others the principle of agency is invoked, and the mortgagor in making the contract is treated as the agent of the mortgagee. The difficulty with this last position is that it is contrary to the facts.

In *Urquhart v. Brayton*, 12 R. I. 169, DUFFEE, C. J., holds the defendant liable to a third person on the ground of a novation, while POTTER, J., in the same case places the liability on the ground of money had and received. There seem to be several difficulties in treating it as a novation; first, it changes the nature of the contract; second, it requires a third party, and here are but two; and third, an essential element of a novation is wanting, the discharge of the original debtor.

In other cases the transaction is treated as a sale of the land irrespective of the mortgage and a retention by the purchaser of a portion of the purchase-money, to be paid to the mortgagee. *Hoff's Appeal*, 24 Penn. St. 200; *Urquhart v. Brayton*, 12 R. I., *supra*; *Blyer v. Monholland*, 2 Sandf. Ch. 478. When the circumstances will warrant that view of the facts there is no difficulty. In such cases the debtor actually places or leaves the money in the hands of the promisor to be paid to the creditor, and the action for money had and received may be maintained, not on a promise to the debtor but on an implied promise to the creditor.

Other cases, and this class includes a large number, resort to the

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doctrine of suretyship. *Blyer v. Monholland*, 2 Sandf. Ch., *supra* ; *Curtis v. Tyler*, 9 Pal. 432 ; *King v. Whitely*, 10 id. 465 ; *Bissell v. Bugbee*, 7 Reporter, 550 ; *Crowell v. Currie*, 27 N. J. Eq. 152. We agree that that ground would be tenable, in equity at least, if that was the real contract between the parties; that is, if the parties really intended by the transaction to furnish additional security to the creditor. If not, it seems to us difficult to support the decisions upon that ground. In order to do so the court must assume without reason and contrary to the fact that such was the object and purpose of the contract. We have already endeavored to show that it was not. Let us examine the subject a little further. There is no express contract of suretyship. Whatever element of suretyship there is results by operation of law from the position in which the parties place themselves. The defendant agreed with the debtor that he would pay the debt. As between themselves he thereby became the principal debtor. The original debtor not being discharged he was also liable to the creditor. If compelled to pay he was a surety only in this, that he had a right to call on the defendant to indemnify him. But all this did not affect the creditor and he is not a party to it. What interest has he in the transaction ? And in what consists his equity ? To make that relationship available to him, it is necessary not only to bring him into contract relations with the other parties, but also to reverse the positions of the principal and surety and make the purchaser the surety instead of the principal. Upon what principle can that be done ? By what process of reasoning can it be vindicated ? Again, there is no implication of suretyship as between the creditor and the other parties, as no such implication is necessary in order to give full effect to the intention of the parties.

We come now to a class of cases which constitute an important exception to the rule we are considering, that suits must be brought by the party making the contract and from whom the consideration moved. We refer to those cases in which the parties confessedly contracted for the benefit of third persons, not incidentally but as the principal object. Some of the cases cited by the plaintiffs are cases of this description and are not applicable to the case at bar. There may be cases however in which this principle is invoked to sustain actions by the mortgagee against the purchaser of the equity of redemption.

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• The principle itself is best illustrated by a brief reference to a few of the leading cases. In *Dutton v. Pool*, 1 Vent. 318, the defendant promised the father to pay the daughter a sum of money as a marriage portion. It was held that the daughter might sue on the promise. The relation of the father to the daughter and his obligation to give her a marriage portion seem to be adopted as a substitute for privity of contract. Some of the decisions in the State of New York have taken a similar view and treat the obligation of the mortgagor to the mortgagee as a "substitute for privity," or "privity by substitution," to connect the mortgagee with the contract. *Vrooman v. Turner*, 69 N. Y. 280 ; s. c., 25 Am. Rep. 195, and cases cited. *Dutton v. Pool*, in modern times in this country, would be upheld on the ground that the promise was intended for the benefit of the daughter as its object.

In *Felton v. Dickinson*, 10 Mass. 287, the defendant promised the father of a minor son to pay the son a sum of money for his services. After performing the service it was held that the son might maintain an action in his own name. In *Farley v. Cleveland*, 4 Cow. 432 (s. c. in error, 9 id. 639), the defendant bought hay of the debtor, in consideration of which he promised to pay the debt due the plaintiff. The plaintiff maintained a suit in his own name. In *Hendrick v. Lindsey*, 93 U. S. 143, the defendant promised A. that if he would sign a bail bond he would give him a bond of indemnity. A. and B. signed the bail bond and it was held that they could jointly maintain an action on the promise. In these cases there is no difficulty in discovering an intention to benefit the third person.

And yet this exception seems not now to be recognized in England. *Tweddle v. Atkinson*, 1 B. & S. 393. Even in Massachusetts the tendency is to narrow the exception and adhere more rigidly to the rule. *Exchange Bank v. Rice*, 107 Mass. 39 ; s. c., 9 Am. Rep. 1. It seems to us that the exception to the rule is a reasonable one and should prevail.

The question then recurs, is the case at bar within the exception? We have already expressed our views as to the nature of the contract and the real intent of the parties. If we are right it is clear that the question must be answered in the negative.

That the incidental advantage to the creditor (if it is an advantage to have his debt paid by one man rather than another) is not such a benefit as the exception contemplates, is apparent from a consid-

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eration of the possible and even probable consequences of holding it to be so. The case before us affords a good illustration. The debtor is insolvent, and the property mortgaged has largely depreciated, so that it fails to pay the debt. Now if the plaintiffs may recover the balance of the defendant, they have a security for their debt which they did not originally have, which they never contracted for, and which the contracting parties did not intend that they should have. It in effect makes him the absolute guarantor of the debt.

Whatever doubt may have existed as to the state of the law in New York on this subject, it seems to be set at rest, for the present at least, by recent decisions. In *Garnsey v. Rogers*, 47 N. Y. 233; s. c., 7 Am. Rep. 440, which was an action like this, the court says, by RAPALLO, J.: "I do not understand that the case of *Lawrence v. Fox*, 20 N. Y. 268, has gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being neither privy to the contract nor to the consideration. To entitle him to an action the contract must have been made for his benefit. He must be the person intended to be benefited. * * * If such a contract could be enforced by the creditor who would be incidentally benefited by its performance, every agreement by which one party should agree with another, for a consideration moving from him, to become security for him to his creditors, or to advance money to pay his debts, could be enforced by the parties whose claims are thus to be secured or paid. I do not understand any case to have gone this length."

The case of *Merrill v. Green*, 55 N. Y. 270, was this: Roberts and Green were partners. They dissolved, and Green and one Nichols executed a bond to Roberts conditioned that Green should pay all the partnership debts. In a suit on the bond by a creditor it was held that creditors could not sue. GROVER, J., says: "Green was liable with Roberts for the payment of the firm debts. He agreed with Roberts upon a valid consideration to assume the payment of the whole of the debts, and Nichols undertook that he should perform this contract. This was no agreement made by Green and Nichols with the creditors or for their benefit, but one with Roberts to exonerate him from his liability for the debts of the firm, payment of which Green was to make, and in case of his

default, such payment to be made by Nichols. All the liability incurred by either was upon the bond, and this was to the obligees only."

The case of *Vrooman v. Turner*, 69 N. Y. 283; s. c., 25 Am. Rep. 195, was also the case of a mortgage. ALLEN, J., says: "To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent of the promisor to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited." In *Simson v. Brown*, 68 N. Y. 361, the court says: "But it is not every promise made by one to another, from the performance of which a benefit may accrue to a third person, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must have been made for his benefit as its object, and he must be the party intended to be benefited."

We advise the Superior Court to render judgment for the defendant.

Judgment accordingly.

In this opinion the judges concurred.

NOTE BY THE REPORTER.—In *Dean v. Walker*, Illinois Supreme Court, September, 1863, it was held that the grantee of mortgaged premises, under a conveyance stating that he assumes the payment of the mortgage, is liable for the payment of the mortgage although the grantor himself was not personally liable to the mortgagee. The court said: "But it is contended as Jenks held title to the equity of redemption without any personal liability resting upon him to pay the mortgage, the assumption clause in his deed to Dean imposed no obligation on Dean, and as Dean was therefore under no legal obligation to pay the debt, the assumption clause in his deed to Walker created no liability in him. In other words, the position is that a grantee of mortgaged premises cannot be made liable to pay the mortgage indebtedness by an assumption clause in the deed, however strong the intent may be expressed by the language used, unless the grantor is himself at the time of making the deed liable for such indebtedness. We are aware of the fact that there are cases which sustain this view of the law; such are *Troller v. Hughes*, 12 N. Y. 74; *King v. Whittely*, 10 Paige, 465, and the late case of *Vrooman v. Turner*, 69 N. Y. 280; s. c., 25 Am. Rep. 195; but we are not inclined to follow them. The New York cases are predicated upon the principle that where the grantor is liable for the mortgage indebtedness and the deed under which he conveys contains an assumption clause, the grantee becomes the principal debtor by virtue of the agreement, and the grantor occupies the situation of a mere surety for him as to the payment of the mortgage indebtedness. Such being the relative situation of the parties in equity, the creditor, who is the mortgagee, is entitled to the benefit of all collateral obligations for the payment of a debt which a person standing in the situation of a surety for others has received for his indemnity to release him or his property from liability for such payment. 10 Paige, 468. It is quite true that this principle of equity could not be invoked and this remedy in equity made available if the grantor of the mortgaged premises was not himself liable for the mortgage indebtedness, for the reason that the situation of principal debtor and surety would not exist between the grantor and grantee. But is there no other principle of law upon which the grantee may be rendered liable upon a contract which he has deliberately made upon a valid consideration? We think there is, that it may be placed on the broad and well-settled principle that where one person makes a promise to another, based upon a valid consideration for the benefit of a person, such third person may maintain an action upon it. Here it was not necessary that any consideration should pass from the owners of the

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mortgages to Walker; it was enough that his contract was based upon a consideration which moved from Dean to him. A portion of the purchase-price of the land was left in his hands, in consideration of which he agreed with his grantor, Dean, to pay the mortgage. It was a matter of no consequence to him whether Dean was legally bound to pay those mortgages or not. Dean had the right to make such a disposition of the purchase-money as he saw proper in selling the land; he might have decided that the purchase-money should be paid by Walker to some public charity, to a church or a college, and if Walker in making the purchase agreed to pay the purchase-money to any or either of these objects, no reason is perceived why he might not be compelled to perform his contract. It was no concern of his to whom the purchase-money should be paid; Dean had the right to make such disposition of it as he saw proper, and when for some reason known to himself he saw proper to direct that the mortgage on the land should be paid from the purchase-money which Walker agreed to pay for the premises, and Walker expressly agreed to pay these mortgages, it is a matter in which he is in no manner concerned whether Dean was legally liable to pay such mortgage indebtedness or not; it was enough that he for a valuable consideration assumed the mortgage and agreed to pay the same. The question here involved arose in a recent case in Pennsylvania (*Merriman v. Moore*, 30 Penn. St. 79,) and it was there expressly held that it was not necessary to a recovery that the grantor should be himself liable to pay the debt, that the vendor had the right to direct to whom the purchase-money might be paid, and if the vendee agrees for a valuable consideration to make payment according to the directions of the vendor, he cannot set up as a defense that the vendor was not bound to pay. In deciding the case it is said: "A vendor may direct how the purchase-money shall be paid. He may reserve it to himself, donate it to a public charity, or make such other disposition of it as may best meet his views; and if his vendee agrees to pay it according to such directions he cannot set up as a defense that his vendor was under no duty to apply it in such manner." SHELTON, C. J., and DICKET, J., dissented, and in the dissenting opinion observed: "Where a promise for value is made to one for the benefit of another with the intention to benefit him, it is conceded the beneficiary may maintain an action in his own name upon a breach of the promise. In this case however the action is brought in the name of the man to whom the promise is alleged to have been made, and not in the name of the one for whose benefit it is supposed to have been made. If it be the true construction of this promise that it was intended for the benefit of the holder of the mortgage, then Dean as between himself and Walker is a mere surety for Walker and can maintain no action, at least for more than nominal damages, until he has paid money to the holder of the mortgage. Until then he is not damaged by the failure of Walker to pay. It can add nothing to his right of recovery, that he sues for the use of the mortgagee. Aside from this it seems to me that the true construction of the promise of Walker to pay off the mortgage is that he undertook to indemnify Dean against the mortgage. Such is the teaching of the New York cases referred to, and we think they are sound. See also *Norwood v. De Hart*, 30 N. J. Eq. 412, and *Müller v. Whipple*, 1 Gray, 317. We do not say that a grantee of mortgaged premises cannot be made liable to pay the mortgage indebtedness by an assumption clause in the deed, however strong the intent may be expressed by the language used, unless the grantor is himself, at the time of making the deed, liable for such indebtedness. What we think is that in a case where the grantor is not personally liable as here, the words called the assumption clause are to be construed as a mere indemnity to the grantor, unless there was an intention on the part of the grantor to do a kindness to the mortgagee or confer a benefit on him. No doubt a grantor if he chooses may contract with a stranger, that the latter will pay a given sum to a friend of the grantor, or to any one to whom he may choose to do a kindness or confer a benefit upon, and in such case the contract could be enforced by the beneficiary. In this case there are no words in the deed and no evidence or circumstances indicating that the grantor took any interest in the welfare of the then unknown holder of this mortgage, or intended to confer upon him any benefit. It is to be supposed from the circumstances there was no such intention, and in such case we are of opinion no action can be maintained on the promise by the mortgagee, or for his use, and that the promise must be understood as only for the indemnity of the grantor."

See *Campbell v. Smith* (71 N. Y. 26), 37 Am. Rep. 5; see also note, 26 Am. Rep. 660.

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(48 Conn. 343.)

Attorney at law — Liability for officer's fees.

The attorney in a cause is presumptively liable for sheriff's fees on writs delivered by him for service.*

ACTION for sheriff's fees. The opinion states the case. The plaintiff had judgment below.

A. H. Averill, for defendant.

L. D. Brewster and *H. Scott*, contra.

PARK, C. J. The plaintiff, a deputy sheriff, sued the defendant, an attorney at law, for fees due him for the service of writs placed in his hands for service by the defendant. The plaintiff claimed that the placing of the writs in his hands for service, constituting a request that he should serve them, raised an implied contract on the part of the defendant to pay his fees for the service. The defendant claimed that in such a case there was no implied agreement to pay the fees, but that, as he was an attorney, acting for his clients, and they were known to the plaintiff, the clients only were liable to the plaintiff, unless he himself expressly agreed to pay the fees. The parties were at issue upon some questions of fact, but the points of law claimed by each were as here stated. The court charged the jury that an attorney might make himself personally liable for the fees of an officer, by either an express or implied contract, where such was his intention; that if he failed to disavow a personal liability at the time, the fact that he was contracting for his principal and not for himself might be gathered from the circumstances; that the burden of proving the implied contract rested on the plaintiff; and that the court would not say what facts or circumstances would constitute sufficient evidence of the implied contract, but that it was a question for the jury whether the contract was as claimed by the plaintiff or as claimed by the defendant. The jury returned a verdict for the plaintiff for the full amount of the fees charged.

* See *Tilton v. Wright* (74 Me. 314), 43 Am. Rep. 593, and note, 593.

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The defendant has no reason to complain of these instructions. If they err at all it is in his favor. Under them the jury must have found that he intended to make himself personally liable. An actual intent to do so was not necessary. Such an intent might be inferred from his conduct. While in one sense the client is the principal and the attorney the agent, and while the attorney is professionally and constantly acting for clients, whose names from the records of the courts and other means of publicity are almost always known or may be so, yet there are peculiarities in his case which make it necessary to apply to it with some qualification the general principles of agency. In most cases of agency the principal is what the name imports — the leading person in the transaction. The agent is, as the term implies, a mere subordinate, important only as the representative of the principal; often representing only one principal. An attorney at law, on the other hand, occupies a position of recognized importance in itself, not infrequently of great prominence before the public, in which he often has a large number of clients, his relations to whom are full of detail, and who are little noticed by the public. In these circumstances, if every officer who serves a writ at the attorney's request, if every clerk of court who enters a case for him upon the docket, is to look only to his clients as their debtors, an inconvenience will be wrought that has no commensurate good to counterbalance it. It is true that an officer can refuse to serve a writ unless his fees are paid or secured, but this right is practically of little advantage to him. A writ is sent him by mail by an attorney of some other town or county. It requires immediate service. The officer desires to be prompt and faithful. It is putting upon him an unnecessary burden to require him to take the risk of losing his fees, or to wait till he can hear from the plaintiff or his attorney at the risk of losing all opportunity to make service of the writ. It is perfectly easy for the attorney, if he does not wish to be personally responsible, so to inform the officer when he gives him the writ. It is to be borne in mind that the attorney knows the plaintiff, while the officer may know nothing of him. It is generally the case that an attorney has a running account with certain officers who serve a large number of writs for him, and who would be put to great inconvenience if compelled to make their charges in each case to the plaintiff, especially when they have no knowledge that the attorney has received actual authority to bring the suit. The attorney has already his account

with his client, knows what the fact is as to his authority to bring the suit, and could without inconvenience have required a prepayment of the expenses of instituting the suit, and ought to have done so. In every view of the case the rule seems a reasonable one, and the only reasonable one, that an attorney placing a writ in an officer's hands for service is to be regarded as personally requesting the service and as personally liable for it, unless he expressly informs him that he will not be personally liable, or there are circumstances which make it clear that that was the understanding of the parties.

This is really no departure from the general law of agency. An agent can always bind himself personally where such is his intention. Here it is merely held to be a fair inference from the act of the attorney in placing the writ in an officer's hands and giving no notice to the contrary, that he intends to be personally liable for his fees. And this inference undoubtedly accords with the actual fact in the great majority of cases. Indeed the exceptions are probably so few as hardly to be entitled to consideration.

This view is sustained by nearly all the authorities, both English and American. In *Walbank v. Quarterman*, 3 C. B. 94, MAULE, J., says: "The inconvenience would be prodigious if it were held that the officer must look to the client for his fees, and there is no inconvenience in the other course." In *Judson v. Gray*, 11 N. Y. 413, the court, in holding that an attorney is not personally liable for the fees of a referee, expresses doubt whether upon the general principles of agency an attorney should be held liable for the fees of an officer, yet says that there are special considerations affecting that question, and that in view of repeated decisions in that State, it should be considered as settled that an attorney is liable for the fees of an officer in the absence of notice to the contrary. See also, *Weeks on Attorneys*, 232; *Scrace v. Whittington*, 2 B. & C. 11; *Foster v. Blakelock*, 5 id. 328; *Robbins v. Bridge*, 3 M. & W. 114; *Brewer v. Jones*, 16 Exch. 655; *Adams v. Hopkins*, 5 Johns. 252; *Ousterhout v. Day*, 9 id. 114; *Campbell v. Cothran*, 56 N. Y. 279; *Tarbell v. Dickinson*, 3 Cush. 346; *Fowle v. Hatch*, 43 N. H. 270.

A new trial is not advised.

In this opinion the other judges concurred.

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AMERICAN RAPID TELEGRAPH COMPANY V. CONNECTICUT TELEPHONE COMPANY.

(49 Conn. 352.)

Telegraph — conflict of law — rights of licensor of patent.

The defendant, a Connecticut telephone company, had purchased from a Massachusetts telephone company, owning the patent, the right to use its magnetic telephone system for a certain period, on the condition that it should not permit telegraph companies to use the system unless they had purchased the right from the Massachusetts company. A statute of Connecticut provides that every telephone company shall impartially permit persons and corporations to transmit speech through its wires by its instruments. The plaintiff, a telegraph company in Connecticut, not having purchased the right, sued to compel the defendant to permit it to use the system. *Held*, not maintainable. (*See note*, p. 241.)

APPPLICATION for *mandamus*. The head-note and opinion show the case. The application was dismissed.

A. S. Treat and C. Sherwood, for plaintiff.

J. S. Beach and M. F. Tyler, for defendant.

PARDEE, J. In March, 1876, A. G. Bell became the patentee of the magnetic telephone, a mechanical device capable of transmitting articulate speech through wires by the power of magnetism and electricity; others subsequently became patentees of various improvements upon it and of appliances to be used therewith; and the American Bell Telephone Company, a corporation chartered by, and having its legal location in the State of Massachusetts, became the owner of these several patents.

In May, 1880, the Connecticut Telephone Company was organized as a joint-stock corporation in and under the laws of the State of Connecticut, for the purpose of building, owning and operating systems of telephonic exchange therein. In February, 1881, it purchased from the American Bell Telephone Company the privilege of using, upon conditions and under limitations, certain of its magnetic telephones for the period of seven years within the limits of the city of Bridgeport, in a telephonic exchange system to be there established; the instruments to continue to be the

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property of the American Bell Telephone Company, and a stipulated rent to be paid for the right to use each one.

The answer, among other things, alleges that the contract by which the Connecticut Telephone Company acquired from the American Bell Telephone Company the right to use its instruments, prohibits the former from allowing any such instrument placed outside of the limits of said city to be put in communication, either with the instrument in the central office or with that of any subscriber within the city, and from allowing any telegraph company to use the system of telephonic exchange for Bridgeport for the purpose of receiving from its customers messages to be sent, or delivering to them messages which have been sent over its wires, unless such telegraph company has purchased from the American Bell Telephone Company the right to use that system ; that the Western Union Telegraph Company has purchased from that company the right, exclusive of all other telegraphic companies, to use every telephonic exchange system which may be established in the United States under the patents of the American Bell Telephone Company in connection with their business, and now uses and has the right to use the defendant's system in Bridgeport, to the exclusion of the plaintiff ; and that the defendant does not own and therefore cannot give to the latter the right which it demands.

The plaintiff insists that the defendant has offered its services to the public as a common carrier of articulate speech ; that it has thereby made itself the servant of the public and has subjected itself to the operation of the general law which compels all such servants to serve applicants impartially, regardless of the limitations placed upon its use of the instruments. But the property of the American Bell Telephone Company in its patent is absolute and exclusive ; it can rent or sell it in whole or in part ; it can refuse to make or use, or to allow any one else to make or use, the telephone described in it ; or it can make and sell one and no more, and put such restrictions as it pleases upon the time, place and manner of using that ; and it was the privilege of the Connecticut Telephone Company to purchase from it even the most limited right to use one or more of its instruments, and it is not within the power of the court either to enlarge or diminish the purchase.

In this respect the position of the Connecticut Telephone Company is quite unlike that of railroad companies which have in the

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exercise of their respective franchises voluntarily undertaken by contract to put limitations upon the use of property absolutely their own and discriminate in favor of certain applicants for transportation ; unlike that of proprietors of grain elevators, who have been declared to be warehousemen, and as such to have brought themselves within the power of the legislature to regulate their tolls and compel them to render impartial service to applicants for storage ; and unlike that of railroad companies which have undertaken to bind themselves by contract not to do in behalf of the public the service, the doing of which was the consideration upon which they received valuable franchises. The record does not show that the defendant ever exercised the right, or declared to the public that it had the right, to use the telephonic instruments upon any other terms than such as are strictly conformable to the measure of use granted to it by the owner of them ; does not show, and we may not assume, that it failed to purchase the largest possible measure ; and does show that it has offered that measure to the plaintiff.

Neither by availing itself of the right to organize as a joint-stock corporation in this State, or of the right granted by statute to all telephonic proprietors to carry wires upon poles set in the public ways, nor even by taking from the legislature of this State the most unlimited franchise, can the defendant draw to itself the right to any use of the telephones belonging to the American Bell Telephone Company in excess of the grant. The citizens of this State cannot deprive the latter of its property in its patent simply by investing the Connecticut Telephone Company with a franchise to convey speech, nor compel the latter to sell to the plaintiff rights which it does not possess.

A statute of this State provides in effect that every telephonic company shall with impartiality permit persons and corporations to transmit speech through its wires by its instruments. The utmost reach of this is to require them to make an impartial use of such rights or privileges as they possess. If their system is carried into effect by instruments which are not the subjects of a patent and they so conduct their business as to become common carriers of speech, they are to serve applicants with impartiality ; or if it is carried into effect by patented instruments, of which patents they are the owners, the same result is to follow ; but if it is carried into effect by instruments which are the subjects of a patent which

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is the property of a resident of another State, and from whom they are able to purchase, not the instruments themselves, but only a right to the temporary use thereof, subject to conditions and limitations, they are only required to give impartially to applicants the use of the full measure of the right which they have been able to procure. The statute cannot confer power upon courts, either to order them to buy that which cannot be bought or to use the property of another without his consent. The legislature may deny the use of highways for the erection of poles for the support of wires to any corporation which is not the full owner of the telephonic patents by which its system is operated, and which is not able to give a perfectly unrestricted and impartial use of all their capabilities to applicants, or to any corporation which proposes to use telephonic patents under any restrictions whatever imposed by the owner; and so embarrass and hinder as to induce them to become full owners of such patents or retire from the service of the public. Legislatures for reasons of public policy in many ways put limitations upon absolute owners in the use of their property; but they cannot transfer the property of one to another without compensation even for the public good.

Again, the American Bell Telephone Company is located in another State; it has not been made nor of itself become a party to this proceeding; has not submitted itself to the jurisdiction of our courts. By leasing certain of its patented instruments to be used in this State under limitations, it did not surrender its invention to the public use here, nor here become a common carrier of speech, nor expose itself to the power of our courts to determine that it had forfeited the exclusive ownership of its patent in behalf of its limited lessee. Nor was it in the power of that lessee to confer authority upon our courts to confiscate, either in its behalf or in behalf of the public, the reserved rights of its lessor, by bringing its fragmentary right into this State and devoting it to the service of the public.

The owner of a patent who leases for a limited term, upon conditions and under restrictions, an instrument or piece of mechanism covered by that patent, cannot, as the result of the lessee's manner of use thereof, be subjected to the law governing common carriers or public servants, so as to be concluded by a judgment that he has dedicated his patent to the public and forfeited his reserved rights in it.

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If the lessee, the Connecticut Telephone Company, so uses its rights here as to subject itself to the operation of that law and offends it, the courts will stop the misuse of its limited rights ; but the decree will not reach beyond those rights ; will not transfer to it any property or rights to the use thereof which it has not purchased.

It is said further, that in incorporating limitations and restrictions in its lease of its instruments to the Connecticut Telephone Company, the American Bell Telephone Company has violated a statute of the State which incorporated it and where it has its existence. That statute is in effect the same as our own, previously cited. But the American Bell Telephone Company is the owner of letters-patent for an electric speaking telephone, and of course has the right to manufacture and sell or lease the instruments. It has also legislative permission to extend lines of wire within the State of Massachusetts for conveyance of articulate speech for compensation. It is to the company in this last capacity, and within that State solely, that the statute applies. It does not affect its right as the owner of an instrument to lease it to a citizen of another State upon conditions ; nor does it affect the right of such citizen to hire it under limitations ; he assuming the risk of being denied the privilege of using his limited right within his own State.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

NOTE BY THE REPORTER.—In *State, ex rel. American Union Telegraph Co., v. Bell Telephone Company of Missouri*, before Judge THAYER, of the St. Louis Circuit Court, there was an application for *mandamus* to compel the defendant to connect the plaintiff's office with its wires, and give it the use of telephonic facilities. The defendant contended that it could not be compelled to do so, because by the terms of its license from the patentee of the invention it was forbidden to connect with any telegraph office or permit any telegraph company to become one of its subscribers. The court observed : " Bearing in mind that the respondent serves the public as a common carrier of messages, not by keeping offices and agents of its own to which the entire public may resort, but by applying instruments to private residences and offices, and thereby enabling its subscribers to communicate directly with each other, it becomes evident that this clause of the contract, if enforced as a valid provision, would compel the respondent to discriminate against a class of individuals or corporations engaged in a particular calling, to the extent of denying them any telephonic facilities whatsoever. In other words, a corporation created under the laws of this State, and endowed with large privileges, among others with the right to appropriate private property (presumptively on the theory that such a corporation is a public servant), is compelled by the natural operation of this provision of the contract, to withhold facilities for the transaction of business from one class of citizens which it accords to others. In my judgment, this clause of the contract is indefensible when called in question by any person or corporation injuriously affected thereby. In so far as the contract between the respondent and the patentee compels the

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former to discriminate against one class of its would-be customers, and to deny them the same privileges and service which it accords to others, the contract is invalid. It is not possible to admit the principle that a railroad, telegraph or telephone company may avoid the performance of any part of the paramount duty they owe to the entire public, by contract obligations which they may enter into, even with the patentee of an invention. If the principle were conceded, it is quite obvious that such corporations might readily avoid the performance of any public duty that became inconvenient or burdensome. It would become possible to discriminate at pleasure both against individuals or classes." "If the relator, owing to the peculiar nature of its business as a telegraph company, shall attempt to make such use of the telephone as the respondent seems to anticipate, the question as to the legality of such use can only be tried and determined when the emergency arises, and in some appropriate form of proceeding." In another phase of the same case the court observed: "The principles of law applicable to railroad companies and other common carriers unquestionably apply to telegraph and telephone companies. Having established their lines and adopted a uniform mode of serving the public consistent with their chartered powers, they must treat all persons similarly situated with respect to those lines alike, and without unjust discrimination. It is not for them to select whom they will serve, or impose conditions of service on one class of customers that do not apply equally to all persons occupying the same relative position toward the company. * * * If it erects its main line along a certain street or streets under a power granted in its charter to use public highways for that purpose, and under a charter granting it the power to condemn land for the construction of a telephone line, and if it elects to serve the public by furnishing instruments to residents along such line for private use, and by making connections between such instruments and its main lines; above all, if it holds itself out to the public as prepared to furnish such instruments and make such connections for all who may apply, then I should say that its duty to the public compels it to treat all residents along such line with absolute impartiality. It cannot grant such facilities or render such service to one citizen or corporation and refuse like privileges to his next door neighbor. * * * It follows, from the principles above stated, that in refusing to grant to the relator such facilities as it affords to other customers, it has violated an imperative duty imposed upon it by law."

In *Louisville Transfer Co. v. Am. Dist. Telephone Co.*, Louisville Chancery Court, it was held that the employment of a telephone company is public, and such a company is bound to serve the public without discrimination. The plaintiffs were proprietors of public omnibuses and carriages, and the defendants were a telephone company and also proprietors of public carriages. The defendants were restrained from removing their telephones from the plaintiffs' offices, and from refusing to transact the plaintiffs' telephone business, pursuant to a contract between the parties. The court, EDWARDS, chancellor, said: "The real contention between the plaintiff and defendant is confined to their carriage and coupé services; defendant insisting that as against plaintiff, a rival in that business, it has the right to a monopoly in the use of its own telephonic methods of communicating and receiving orders for coupés; that a mere rival in one branch of its business cannot force it to afford it the facilities which it has provided for another branch of its business. Upon the facts appearing upon the petition and affidavits of plaintiff, it is the opinion of the court that defendant is engaged in two distinct employments—one in operating a telephonic exchange, and the other in operating a carriage or coupé service. Plaintiff and defendant are not rivals in the former business, and as to that part of defendant's business, it occupies the same position toward plaintiff as it does toward the rest of the public; that defendant is a quasi public servant, and as such is bound to serve the general public, including plaintiff, on reasonable terms, with impartiality; that defendant is governed by the principles of the law of common carriers. See *Bennett v. Dutton*, 10 N. H. 581; *New England Express Co. v. Maine Central R. R. Co.*, 57 Me. 188; s. c., 2 Am. Rep. 31; *Sanford v. Railroad Co.*, 24 Penn. St. 351; and *McDuffee v. Railroad*, 52 N. H. 447; s. c., 18 Am. Rep. 72; *Munn v. Illinois*, 4 Otto, 113. The principles announced in an opinion by Judge THAYER, in *American Union Telegraph Co. v. Bell Telephone Co.*, should determine this controversy. The mere fact that defendant may possess dual powers, and is operating or carrying on two distinct kinds of business, cannot exempt it from the general rules governing such corporations, with reference to the

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general public; and to determine the rights of the plaintiff, defendant must be considered as a telephone company and as a transfer company. See *Claxton's Admr. v. Lexington and Big Sandy E. Co.*, 18 Bush, 688. The law must adapt itself to the new subjects that are brought within the range of judicial action. And courts must reason by analogy from things that are settled, in order to establish principles to govern things that are unsettled. 4 Am. Law Reg. (N. S.) 198. The rule that defendant is bound to serve all the public alike, under like circumstances, is the one applied by the court in this case, and plaintiff is a part of the public, and defendant, as to its telephonic business, is a distinct person from itself as a transfer company, so far as the rights of others are to be determined. The rights of plaintiff do not depend upon contract, but the general principles before stated. Defendant had a right to terminate its contract with plaintiff, but as it holds out as the servant of the public, it must act with perfect impartiality toward its customers."

HEMINGWAY V. COLEMAN.

(40 Conn. 396.)

Fraud — sale — confidential relations.

The defendant had been a trusted laborer in the service of A. in taking care of oyster beds. Seven years after he left the service, but while he was on friendly terms with A., the latter became feeble in mind and unable to manage his own affairs, and his wife, intelligent and capable, transacted them for him. The wife, on the defendant's advice and by defendant's agency, sold part of the oyster beds, and wishing to sell the rest, the defendant offered to buy them, and she said he might have them if he would pay as much as any one else. The defendant then offered \$200, although he knew they were worth \$500. The sale was completed on those terms, the wife believing the defendant honest and friendly and that he would offer a fair price, and making no inquiry, and he knowing her reliance. *Held*, that the sale should not be set aside.

BILL to set aside a sale. The opinion states the case. The plaintiff had judgment below.

J. W. Ailing and L. N. Blydenburgh, for plaintiff in error.

S. L. Bronson and C. Ives, for defendant in error.

PARDEE, J. This is a bill in equity by the widow of Jacob P. Angur, and by the administrator upon his estate, charging the respondent with having by fraud, and by false and deceitful representations, obtained from the deceased deeds of certain oyster

grounds, and asking the court to compel the re-conveyance of the same.

From 1854 to 1872 the respondent was in the service of Mr. Augur as a laborer, and was chiefly employed in laying oysters in and taking them from their beds; at times, in the absence of his employer, directing the shipment of them from Fair Haven. He was a trusty and trusted servant. In the later years he commenced and has since continued business on his own account, the friendly relation between himself and Mr. Augur continuing during the life of the latter.

In 1879, Mrs. Augur, who was found to be an intelligent and capable woman, practically managed the business of her husband, he being to a large degree mentally incapacitated. She deeming it advisable to sell certain oyster grounds belonging to him, so stated to the respondent; he told her that the boundaries of the lots would be annually carried away or hidden by the action of water and ice, and that adjoining proprietors in re-establishing their own boundaries would encroach a little upon those of Mr. Augur unless he kept a sharp lookout; and that changes in legislation concerning oysters were talked of. Subsequently, by request of and authority from Mrs. Augur, he negotiated the sale of one lot. She then stated to him that she desired to sell the remaining lots, and he offered to become a purchaser. She said to him that he could have them if he would pay as much as any one else would. On the next day she went to his house and asked him what he would give for them; he replied two hundred dollars; after a moment's hesitation she said she would accept the offer. He paid her the money, and on the next day she caused Mr. Augur to execute deeds therefor and delivered them to the respondent. When he made the offer he knew that the lots were worth at least five hundred dollars and could be readily sold for that sum. Mrs. Augur believed him to be honest and a friend to herself and husband, and therefore that he would offer what he thought to be a fair and reasonable price; otherwise she would have asked some other person as to the value. He knew that she would consider any price which he should offer as being in his opinion fair and reasonable.

For obvious reasons even a court of equity does not undertake to compel obedience to the highest requirements of honor or morality. It contents itself with holding men to a lower or legal and technical morality in the exercise of agencies and powers, and in the

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performance of duties springing from confidential relations imposed by operation of law or voluntarily assumed, such as exist between parent and child, attorney and client, guardian and ward, trustee and *cestui que trust*, principal and surety, partner and partner, landlord and tenant, and others of kindred character. In these it requires the recipient of confidence and of the power of personal control to refrain from abusing them for his own benefit, either by falsehood or suppression of truth ; it imposes upon him an obligation to communicate unasked all knowledge in his possession pertinent to the matter in hand.

We have before us a contract of sale, the parties to which are of full mental capacity ; the vendor believes the vendee to be her friend, and that the friendship, dating from the time when he served her husband as a laborer, has continued unbroken during the seven years which had elapsed since that service terminated ; and she believes him to be honest because of his fidelity. Although friends in fact, in law and equity they were strangers and stood at arm's length in the matter of contract ; for friendship is unknown to law or equity ; in it neither finds any relation involving special confidence. He had not by being a friend become the guardian of her interests in any such sense as to impose upon him a legal duty to sacrifice his own to theirs. She desired to sell a parcel of land and asked him what he would give for it ; he replied two hundred dollars ; after a moment's hesitation she accepted the offer, and this without requiring from him any expression of opinion as to its value, without hearing a word from him in the way of inducement to sell, and without inquiring of any other person, believing that his friendly feelings would induce him to offer the full value. In this she subjected his friendship to a strain which it could not bear, to a strain which the law does not require it to bear. This was her mistake not his fraud.

Information lay all about her, to be had by asking. She refrained from asking, not because of any word or act of his, but of her own choice ; and not being asked to speak, he is not to be held responsible in a court of law for his silence ; for that he is to be remitted to the forum of conscience.

When the minds of persons capable of binding themselves meet in a contract of sale, neither standing in any relation to the other imposing a trust or begetting confidence, with equal knowledge or means of knowledge as to the subject-matter of the contract, in the

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absence of actual fraud a court of equity will not intervene because of inadequacy of price.

Such persons may sell their property for less than its value, or give it away. And the law must either regard such contracts as having been thus made knowingly and purposely, and therefore not to be escaped from as thus intentionally made, or assume the right to modify every contract, which would be intolerable.

There is error in the judgment complained of.

In this opinion the other judges concurred.

BIXBY V. PARSONS.

(49 Conn. 483.)

Master and servant — action for wages — recoupment for seduction.

In an action for wages for service in a family, the employer may recoup damages for the seduction of his daughter.

ACTION for work. The opinion states the case. The plaintiff had judgment below.

C. Lounsbury and H. P. Lawrence, for plaintiff in error.

W. H. Ely, for defendant in error.

PARK, C. J. We think the court erred in sustaining the plaintiff's demurrer to the answer of the defendant.

The action is brought in the name of the assignee of the claim, and in order to maintain the suit he must show that he is the actual *bona fide* owner of it. Gen. Stats. 417, § 6. How can this be true and at the same time the allegations of the defendant's answer be true? We are to assume these allegations to be true, for the plaintiff admits them by his demurrer. It appears by them and the plaintiff's bill of particulars, that during the time of his service with the defendant, George H. Bixby, the plaintiff's assignor, seduced the minor daughter of the defendant, and got her with child, while the daughter was in the service and family of the defendant; and that in consequence thereof the defendant lost her services, which were of the

value of two hundred dollars ; and was subjected to great expense in medical attendance and in nursing her during her confinement, which amounted to the sum of one hundred dollars ; that the assignor made the assignment to avoid payment of these damages ; that the plaintiff knew all these facts at the time he took the assignment, and took it to recover the amount for the benefit of the assignor, paying no consideration for the same.

These are the facts, and upon them it is clear the plaintiff cannot maintain this suit in his own name, for he is not the *bona fide* owner of the assigned claim within the meaning of the statute. He took the assignment knowing for what purpose it was made, and took it to assist his son in recovering the claim without paying the damages. There was clearly no good faith in the transaction.

But if the assignment was valid and the suit maintainable by the plaintiff in his own name, yet he could not recover. The facts are fatal to a recovery. In *Callo v. Brouncker*, 4 C. & P. 518, there was a contract of employment of the plaintiff for one year at the rate of £10 per month, and a dismissal of the plaintiff before the end of the year for claimed misconduct. Justice PARKE told the jury that the contract contained "an implied agreement that if there was any moral misconduct, either pecuniary or otherwise, willful disobedience or habitual neglect, the defendant should be at liberty to part with the plaintiff." The ruling in this case was based substantially upon the ground that such misconduct would break the implied agreement forming a part of the contract of hiring, and would therefore justify a dismissal. We would rather say that the implied contract was, that the servant would faithfully perform his service and abstain from such misconduct. In *Atkin v. Acton*, 4 C. & P. 208, a clerk and travelling agent, hired by the year, assaulted his employer's maid servant with intent to ravish her. It was held that this was good cause for his dismissal without notice, and that a person dismissed under such circumstances was not entitled to recover wages for the time he had served. This decision was likewise based upon the ground that the clerk by his misconduct broke the implied agreement which formed a part of the contract of hiring, and gave the defendant the right to rescind it. In *Ridgway v. Hungerford Market Company*, 3 Ad. & El. 171, it was held that a servant discharged for improper conduct could not recover any part of his salary from the last pay day to the time of his dismissal. The same doctrine was held in *Turner v. Robinson*,

6 C. & P. 15; *Spain v. Arnott*, 2 Stark. 256; *Wise v. Wilson*, 1 Car. & Kir. 662, and *Lomax v. Arding*, 10 Exch. 734. These are all English cases, but the same doctrine has been holden in this country. In *Libhart v. Wood*, 1 W. & S. 265, and *Singer v. McCormick*, 4 id. 265, it was held, that faithful service is a condition precedent to the right of a servant to recover his wages; and if during the time for which he agrees to serve he commits a criminal offense, although not immediately injurious to the person or property of his master, he will not be entitled to recover any part of his wages. See also *Britton v. Turner*, 6 N. H. 481, and *Kearney v. Holmes*, 6 La. Ann. 373.

The law of these cases applies with peculiar force to the case in hand, where the servant while living in his employer's family under the contract of hiring, seduced his minor daughter and got her with child. The contract gave the seducer the right to be in the family, and he took advantage of that right to accomplish his base purpose.

It may be said in the case under consideration, that it does not appear that the defendant dismissed the seducer of his daughter as soon as he obtained knowledge of the fact, nor that he dismissed him at all, and that consequently the law that has been cited does not apply to the case. It is true that the defendant's answer is silent upon the subject, although the seduction is alleged to have been committed about one month previously to the time the bill of particulars states that the seducer left the employment of the defendant. It can hardly be supposed that the injury which he had caused could have been so far developed during the month as to have become known; indeed, the loss of service and the expenses attending the confinement of the daughter must necessarily have occurred long after he had left the defendant's employment. But however this may be, the defendant was entitled, at all events, to recoup those expenses and the damage for the loss of service in reduction of the seducer's claim. The plaintiff seeks to recover the wages on the contract of hiring. The cases cited show that the seducer broke that contract, and these damages resulted to the defendant in consequence of the breach. This gives the defendant the same right to recoup the damages that he would have had if the servant had intentionally killed the defendant's horse, or burned his dwelling, for in such cases the contract of hiring would have been broken. The law is now well established that whenever a party

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seeks to recover on a contract which he has broken, the defendant in the suit has the right to recoup the damages he has sustained in consequence of the breach. In *Satchwell v. Williams*, 40 Conn. 371, where a hired mill operative left his employment without having given the previous notice of his intention to leave which the contract required, and in consequence the work at the mill was hindered, it was held that the claim of the operative for wages up to the day of his leaving was subject to a recoupment for the damages done to the mill-owner, to the full extent occasioned by such hindrance to the operations of the mill.

This right of recoupment is attached to the contract and goes with it into whosoever hands the right may come to sue on the contract. Such would have been the case if the plaintiff was a *bona fide* assignee of the claim in controversy.

We think there is manifest error in the judgment complained of, and hence it is unnecessary to consider the other questions raised in the case.

Judgment accordingly.

In this opinion the other judges concurred.

CATLIN V. HADDOX

(40 Conn 422.)

Infancy — ratification — evidence — presumption.

In an action on a note made by an infant, in the absence of proof that it was given for necessities, or that he retains the consideration, there must be proof of an express promise after majority. Part payment after majority is not sufficient to establish ratification, and indorsements of partial payments in the payee's handwriting, and found after his death, are not evidence even of such payment.

ACTION on a promissory note. The opinion states the facts.
Case reserved.

H. B. Graves, for plaintiff.

C. B. Andrews, for defendant.

LOOMIS, J. The note in suit was executed by the defendant when she was a minor and unmarried. Subsequently she married and removed with her husband to the State of Alabama, and resided there with him until his death in 1861. In 1866 she was married to her present husband, W. T. Haddox, with whom she has resided in Alabama since the fall of 1868. The payee of the note died in 1877, and the plaintiff afterward, as administrator, found the note with other papers of the deceased in the vault of a bank where he had left them. The note was indorsed in the handwriting of the payee as follows: "Interest paid on within note for one year." "Paid on the within note fifty dollars, August 21, 1852."

The plaintiff relies on a confirmation of the contract made during minority by a partial payment made by the defendant after she became of full age. And he claims that the simple indorsement as above establishes the fact of such payment.

It was the exclusive province of the Superior Court to consider the evidence and find the issuable fact. We have however only certain evidential facts which may furnish some basis for inference in regard to the main fact; but we do not regard the former as the equivalent of the latter. The evidence falls below that of an ordinary admission on the part of the defendant. It consists wholly of a written memorandum by the party claiming the benefit of it. Under our statute (if not otherwise), it was legitimate evidence to be considered, but it is incomplete and must be supplemented by other inferences, more or less probable, but by no means necessary, in order to establish the fact relied upon. For instance, after assuming the truth of the indorsement, we do not know when the interest was paid, whether in advance or after due; if before due, it was a payment during minority. In order to give it any force therefore we must presume that the payment was not made until due. Then again, it is not stated by whom the payment was made. It might have been by the husband without the wife's direction, in which case it would be of no account; and here again it has to be presumed that no one would pay but the wife.

Nothing at all is disclosed by the record as to the actual transaction that occasioned the indorsements in question, which ordinarily must have a controlling signification as to the intention of the party. In view of the authorities that have gone farthest in the direction of facilitating the confirmation of contracts by infants

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when of full age, there ought at least to be some act on the part of the maker of the note clearly admitting an actual willingness and intention to pay the whole amount. *Stokes v. Brown*, 4 Chand. 39; *Little v. Duncan*, 9 Rich. 55. But we have found no case where an infant's contract has been held to be validated upon such meagre evidence as this record presents, founded as it is upon the inference to be drawn from the mere fact that the party holding the note and interested in the confirmation had for some unknown reason indorsed on it a part payment.

If then we assume the law to be that a part payment of a note by an infant after full age may be a ratification of the whole so as to make the contract binding, we should hesitate to accept the evidence in this case as a sufficient confirmation.

But to adopt the above as the rule of law in this State would require us to overrule or essentially modify the legal propositions deliberately adopted by this court in two well-considered cases, which have hitherto been accepted as the law of this State.

In *Benham v. Bishop*, 9 Conn. 330, which was an action on a note made by an infant, where the plaintiff claimed a ratification by certain facts peculiar to that case, DAGGERT, J., giving the opinion, says (p. 333): "It is very clear from all the authorities that the note of an infant cannot be ratified by merely acknowledging that he made it or that it is due. Unlike an admission of a debt barred by the statute of limitations, which has been held to remove the bar and authorize a recovery, in the case of the note or bond of a minor there must be a promise to pay when of full age." And he cites several authorities in support of the proposition.

So in the later case of *Wilcox v. Roath*, 12 Conn. 550, in an action of the same kind, where a ratification by the defendant was pleaded, BISSELL, J., in giving the opinion of the court, says, upon the question what amounts to a ratification: "An attempt has been made to show an analogy between this case and cases arising under the statute of limitations; and it has been contended that the evidence which would take a case out of that statute is sufficient to prove the ratification of a contract made by an infant. Such however is not the rule. The cases are not analogous. They stand on different grounds and are governed by different principles. In the one case the debt continues from the time it was contracted. A new promise merely rebuts the presumption created by the stat-

ute, and the plaintiff recovers, not on the ground of any new right of action, but that the statute does not bar the old one. In the other, there never was any legal right capable of being enforced. And in case of a promise after the infant becomes of age, he takes upon himself a new liability, founded, indeed, on a moral obligation existing before. Accordingly it is well settled that a bare acknowledgment is sufficient to take a case out of the statute of limitations. But in regard to the contract of an infant, it has been repeatedly adjudged that there must be an express promise to pay the debt after he arrives at full age; otherwise there is no ratification." And a large number of authorities are cited in support of this reasoning.

There are authorities from other jurisdictions that deny the propositions contained in the opinions we have cited, and that hold substantially that any words or acts after full age which would suffice to revive a promise barred by the statute of limitations would confirm a contract by an infant. See *Stokes v. Brown and Little v. Duncan, supra*.

Yet we believe there is a decided preponderance of legal authority in substantial accord with those citations. In attempting to draw the line between what amounts to a ratification and what falls short of it under the diverse circumstances of the different cases, some confusion has been introduced into the discussion, but much of the conflict is only apparent, and can be reconciled by keeping in mind the distinctions founded on the nature of the contract or the circumstances or conduct of the defendant relative to the subject-matter or the consideration.

In 2 Greenleaf's Evidence, § 367, the author says: "There is however a distinction between these acts and words which are necessary to ratify an executory contract, and those which are sufficient to ratify an executed contract. In the latter case any act amounting to an explicit acknowledgment of liability will operate as a ratification; as in the case of a purchase of land or goods, if after coming of age he continues to hold the property and treat it as his own. But in order to ratify an executory agreement made during infancy, there must be not only an acknowledgment of liability, but an express confirmation or new promise voluntarily and deliberately made by the infant upon his coming of age, and with knowledge that he is not legally liable. An explicit acknowledgment of indebtedness, whether in terms or by a partial pay-

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ment, is not alone sufficient, for he may refuse to pay a debt which he admits to be due." And the numerous cases sustaining this doctrine are referred to in the notes.

In *Robbins v. Eaton*, 10 N. H. 561, there was an interesting discussion of this subject, and the court say: "Payment of part of a note is no ratification of the whole, because the infant may admit only an indebtedness to that extent. The ratification should be equivalent to a new contract. Therefore an express promise as to the whole debt is necessary. There are numerous authorities to this effect, but these are cases where notes were given for articles which had been used or consumed prior to the infant's becoming of age. Where the matter constituting the consideration of the note is not in existence when the infant becomes of age, or is wholly beyond his control, there is nothing upon which an implied promise can arise, and an express promise to pay the debt can alone render the infant liable. * * * But where the consideration of the note is still in existence, in as perfect a state after the infant becomes of age as before, and is subject to his control, he may so deal with the articles or property forming such consideration as to raise an implied promise of payment."

In *Boody v. McKenney*, 10 Shep. 517, SHEPLEY, J., makes an able analysis of the cases on this general subject and classifies them according to the different situations and circumstances in which the infant is placed in regard to the subject-matter of his contract, and the distinctions made will be found to vindicate the result we have reached in the case at bar.

In 7 Wait's Actions and Defenses, § 7, p. 140, it is said: "A voidable contract of an infant cannot after his coming of age be ratified by a mere acknowledgment of the debt. Such at least is the rule applicable to his executory contracts." And *Dunlap v. Hales*, 2 Jones (N. C.), 381, *Conklin v. Osborn*, 7 Ind. 553, and *Bank of Silver Creek v. Browning*, 16 Abb. Pr. 272, which are referred to, abundantly sustain the citation from the text.

In *Edmunds v. Mister*, 58 Miss. 765, decided in 1881, CHALMERS, C. J., in giving the opinion of the court, says: "The executory contracts of infants for the payment of money, not for necessities, impose no legal liability upon them. * * * They can be ratified at common law only by an act or agreement which possesses all the ingredients necessary to a new contract, save only a new consideration. * * * A mere acknowledgment of the

debt is not sufficient, but there must be an express promise to pay, voluntarily made. * * * It stands not upon the footing of a debt barred by the statute of limitations and afterward revived by a new promise, because in such a case there has been an always existing, unextinguished right, since the limitation affects only the remedy and not the right ; but it is rather like a debt wiped out by a discharge in bankruptcy."

The citations that we might make to the same effect are very numerous, but the above will suffice. They are directly applicable to the case under consideration, even if we accept the plaintiff's claim that the finding should be construed as in effect giving him the benefit of the part payment. But at most this is the only fact to sustain the plaintiff's claim that the contract was ratified. The burden of proof was on him to establish the ratification and nothing can be assumed in his favor that is not found expressly or in effect. It cannot therefore be assumed either that the note was given for necessities, or for a consideration that remained within the control of the defendant after she became of full age.

The case upon the finding, construed in the most favorable light for the plaintiff, cannot be brought within any of the classes of cases referred to, that allow a ratification by any thing short of an express promise to pay the debt.

It is not necessary for us to consider any other question made in the case. We advise the Superior Court to render judgment for the defendant.

Judgment accordingly.

In this opinion the other judges concurred.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

PURCELL V. ENGLISH.

(86 Ind. 34.)

Landlord and tenant — liability of former to latter for negligence.

Where a landlord lets apartments in the same house to different tenants, and one of the tenants is injured by means of a temporary accumulation of ice and snow on the common stair-way, the landlord is not liable in the absence of an agreement on his part to keep the premises fit for occupation ; and his promise to repair, made subsequent to the leasing, is not binding. (*See note, p. 262.*)

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

E. C. Buskirk, and P. W. Bartholomew, for appellant.

J. R. Wilson and J. L. Wilson, for appellee.

ELLIOTT, J. The case made by the appellant's complaint, shortly stated, is this : She was the tenant of the appellant, having leased rooms in an upper story of a building owned by him ; the approach

to these rooms was by a stair-way common to the use of all the tenants of the building; the railing of this stair-way had been suffered to get out of repair, and was rotten and loose; the stair-way became dangerous and unsafe from ice and snow, which covered the steps; the appellant, in attempting to descend, slipped, and in falling, grasped the railing, which gave way, and she fell to the pavement and was seriously hurt. It will be observed that the complaint does not allege that the landlord had contracted to repair, but proceeds entirely on the theory that the duty rested upon him independently of contract.

The court, upon the close of the appellant's evidence, directed the jury to return a verdict for the defendant.

[Omitting minor points.]

It is not sufficient, even upon a demurrer to the evidence, that the plaintiff make out some cause of action, but it is incumbent upon him to make out the cause of action set forth in his complaint. He cannot declare on one cause of action and recover upon another. There is in this complaint no allegation that the appeller had agreed to keep the demised premises in repair, and even if a contract had been proved, it is doubtful whether the appellant could have been allowed to succeed on the theory that there was a contract. But waiving this point, and going to the evidence, we are clear that no contract was proved. The utmost that can be claimed is that the evidence tends to show that a voluntary promise, made after the contract, for the letting of the premises had been entered into. This evidence did not establish, nor tend to establish, a contract on the part of the landlord to repair, for it did no more than show a mere gratuitous promise, creating no binding obligation. The rule upon this subject is thus stated in a recent work: "A promise to repair, made after the lease is entered into, is a mere *nudum pactum*, and no liability exists for a failure on his" (the landlord's) "part to make such repairs." Wood Land. & Ten., § 382; *Libbey v. Tolford*, 48 Me. 316; *Gill v. Middleton*, 105 Mass. 477; s. c., 7 Am. Rep. 548; *Doupe v. Genin*, 37 How. Pr. 5; s. c., 45 N. Y. 119. The case is therefore to be treated as one in which there is no contract on the part of the landlord to repair.

Where there is no duty there can be no actionable negligence. Cooley Torts, 659; 1 Add. Torts, § 28; Whart. Neg., § 3. In cases of the class to which the present belongs, three of the essen-

tial things which the plaintiff is required to establish are, the existence of a duty, that it is owing to him, and that it has not been performed. The material part of the appellant's case could not be made out without showing a duty owing to her from her landlord to keep the demised premises in repair.

The duty of the landlord to repair does not arise out of the relation of landlord and tenant; on the contrary, the relation devolves that duty upon the tenant. It is only where the landlord contracts to maintain the premises in repair that he is burdened with that duty. The logical conclusion from this principle, and a more firmly settled one there is not in all the books, is that a landlord, not under contract to repair, is not, as a general rule, responsible to the tenant for injuries caused by a defective condition of the demised premises.

In a carefully written article in the American Law Review the authorities are reviewed and the rule deduced that there is no warranty, express or implied, as to the condition of demised premises, and that the tenant must determine for himself the safety and fitness of the premises for use and occupancy. 6 Am. Law Rev. 614; Taylor Land. & Ten. (6th ed.), § 381. This is the rule adopted by our own cases. *Estep v. Estep*, 23 Ind. 114; *vide* authorities cited, p. 116. Ordinarily therefore a tenant who leases property takes upon himself all risks, except perhaps as against latent defects not discoverable by the use of ordinary diligence, and cannot recover damages from his landlord because of an omission to make the premises habitable or safe.

Whether a tenant would have a right to abandon the premises if the means of access to them had become unsafe and dangerous is not here the question. The question here is, whether the tenant, continuing in possession and making use of the premises, can recover damages for personal injuries caused by the unsafe condition of the means of ingress and egress. There are cases, we may remark in passing, holding that even where the landlord covenants to make repairs and fails to do so, the tenant must, where the expense is not great, make them and charge them against the landlord. *Cook v. Soule*, 56 N. Y. 420; *Loker v. Damon*, 17 Pick. 284; *Miller v. Mariner's Church*, 7 Me. 51; s. c., 20 Am. Dec. 341; *Benkard v. Babcock*, 2 Robt. 175.

The duty of the tenant to keep in safe condition for his own use the demised premises extends to all the appurtenances connected

therewith and this includes steps, stair-ways and other approaches. Whatever passes to the tenant under the lease is for the term designated under his control and in his possession. *Pomfret v. Ricroft*, 1 Saund. (6th ed.) 321; Wood Land. & Ten., §§ 216, auth. n., 371, auth. n. If he neglects to make repairs, and suffers the premises to become unsafe, it is clear that in ordinary cases at least no action will lie against the landlord for injuries suffered by the tenant and caused by the unsafe condition of the premises arising from the neglect to repair.

It is obvious from this statement of fundamental principles that in cases of an ordinary tenancy the tenant cannot maintain an action against the landlord for injuries caused by the neglect to repair the demised premises unless the landlord has expressly covenanted to repair. If the appellant can maintain this action, it must be because her case possesses some elements which carry it out of the general rule.

The only element in this case which can with any plausibility be said to distinguish it from ordinary cases of tenancy is that the landlord hired out apartments to separate tenants, and that the stair-way was the common passage for the use of all. It is difficult to perceive how this fact can exert a controlling influence upon the question of the landlord's liability, for whether the premises are demised to one or to many tenants, the principle upon which rests the landlord's immunity from the burden of repairing is not changed. Nor does it change the effect of the contract by which the premises are demised. As said by a writer already referred to: "For a tenant is at once a bailee and a purchaser. He is a bailee, because his ownership being determinable and not absolute, yet being exclusive while it lasts, he is by the mere fact of demise, and in the absence of special undertakings to that effect, charged with a trust to restore the property in substantially the same condition as when he took it." 6 Am. Law Rev. 614. It would seem clear on principle, that the landlord's duty is the same whether he demises to one or to many tenants, so far as concerns his liability to a tenant for personal injuries caused by a failure to repair.

In *Humphrey v. Wait*, 22 U. Can. C. P. 580, the plaintiff had hired apartments of the defendant in a building occupied in part by other tenants, and sustained injuries by stepping through a hole in the floor of a common passage-way leading to the apartments, and it was held that an action could not be maintained

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against the landlord, and a nonsuit was directed. In the course of the opinion delivered in that case, HAGARTY, C. J., said: "It would be a singular state of the law, if the landlord would not be answerable if he demised the stair-way with the upper story, and would be answerable if he only gave a right to use it, as an approach to the part of the house actually demised." In *Gott v. Gandy*, 2 El. & Bl. 845, Lord CAMPBELL said: "Now let us see what are the facts alleged. They are these: the defendant was landlord of premises which were let to the plaintiffs from year to year; during the tenancy the premises were in a dangerous state for want of substantial repairs; the defendant had notice from the plaintiffs, and was requested to repair them, and did not do so. * * * There is no allegation of any contract to do substantial repairs. It lies therefore on the counsel of the plaintiffs, who are actors, to establish, on authority or on principle, that this obligation results from the relation of landlord and tenant. Mr. Russell can produce no authority in his favor, not even a *dictum*. And I have heard no legal principle from which it would follow that the landlord was bound to repair the premises." In *Carstairs v. Taylor*, L. R., 6 Exch. 216, the doctrine was carried to the extent of holding that there is no liability on the part of the landlord who himself occupied a part of the premises, unless it is shown that he was negligent with respect to the particular act which caused the injury. The English cases agree in holding that for injuries for a failure to repair no action will lie by the tenant against the landlord. 1 Add. Torts, § 240; Smith Land. & Ten. 206; *Robbins v. Jones*, 15 C. B. (N. S.) 221; *Payne v. Rogers*, 2 H. Bl. 350.

Turning to the American authorities we find in one of our books this statement of the rule, whether too broad or not we need not stop to inquire: "The liability of the landlord however exists only in favor of persons who stand strictly upon their rights as strangers." Shearman & Redf. Neg., § 503. Another author says: "An owner being out of possession and not bound to repair is not liable in this action" (*i. e.* for nuisance), "for injuries received in consequence of his neglect to repair." Whart. Neg., § 817. In still another work it is said, in speaking of the landlord's liability: "Nor, in the absence of a covenant to repair, is he liable for injury resulting from the faulty construction or condition of the premises, the control over which is in the hands of a tenant, either to the tenant or third persons." Wood Land. & Ten., § 384; 1 Thomp.

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Neg. 323. In *Corey v. Mann*, 14 How. Pr. 163, the action was for injuries received from falling down a stair-way forming a common passage-way, by one tenant occupying part of premises also occupied by other tenants of the same landlord; and it was held that no action could be maintained. The same general principle is declared in the cases of *Howard v. Doolittle*, 3 Duer, 464, and *Robbins v. Mount*, 33 How. Pr. 24. In *Kaiser v. Hirth*, 46 id. 161, it was held that an owner who occupied a part of the house was not liable for an injury to a visitor to one of his tenants unless it was shown that his, the landlord's, negligence was the cause of the injury, and that the fact that he occupied a part of the premises created no presumption against him. A like doctrine is declared in *Moore v. Goedel*, 34 N. Y. 527. The Supreme Court of California held, in the case of *Loupe v. Wood*, 51 Cal. 586, that there was no liability on the part of the landlord arising from the defective condition of the walls of a cellar.

We have examined the cases cited by the appellant, and do not find any of them in point. The cases in the Georgia reports are not in point, because they are founded upon an express statute making it the duty of the landlord to repair. The cases of *Godley v. Hagerty*, 20 Penn. St. 387, and *House v. Metcalf*, 27 Conn. 631, were actions by a stranger, and are therefore not in point. *Fisher v. Thirkell*, 21 Mich. 1; s. c., 4 Am. Rep. 422, is against rather than in favor of the appellant. In that case the landlord was held not to be liable to one who suffered an injury by falling through a scuttle in a sidewalk adjoining premises in the possession of a tenant. The other case cited, that of *Shindelbeck v. Moon*, 32 Ohio St. 264; s. c., 30 Am. Rep. 584, is also against the doctrine maintained by counsel. In that case the injury was occasioned by the accumulation of ice upon steps leading into a store-room owned by the defendant, but occupied by a tenant, and the holding was that the landlord was not liable for injuries sustained by a stranger. In closing the opinion it was said: "And again, it was the ice that occasioned the accident. It is not averred that it was the duty of the landlord to remove this ice, nor does it appear that he had such control of the premises as called upon him to do it. If this ice was a nuisance to the passing public, endangering their lives and limbs, it was a nuisance arising during the continuance of the lease. It was a thing temporary in its nature, a defective condition of things, such as the tenant was called upon to remedy

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and not the landlord, as between landlord and tenant." We have in our investigation found one case which lends support to the general doctrine for which appellant's counsel contend. The case to which we refer is that of *Looney v. McLean*, 129 Mass. 33 ; s. c., 37 Am. Rep. 295. In that case the wife of the tenant of a part of a tenement-house occupied by several families was injured by the giving way of one of the steps of a stair-way leading to the roof of a shed used in common by the tenants for the purpose of drying clothes ; and it was held that an action would lie against the landlord. The question is not discussed, and only cases from Massachusetts are cited, and they do not decide the point ; on the contrary, such of them as apply to the relation of landlord and tenant recognize the rule that the landlord is not liable to the tenant for a failure to repair ; two of them do not touch upon the subject of a landlord's liability ; one of the two is upon the question of the liability of a railroad company which constructs a passage-way across a public street, and the other is upon the same general question. But conceding the soundness of the ruling in that case, it does not apply to the case at bar, for here the cause of the injury was not the defective construction of the stair-way, or its unsafe condition at the time the premises were leased. The stair-way here is directly connected with the part of the premises leased to the appellant ; in the Massachusetts case it was otherwise. Here the thing which made the stair-way unsafe was the temporary covering of snow and ice ; while in the Massachusetts case the unsafe condition was permanent and had long existed.

It is not necessary for us in the present case to lay down any general rule upon the subject of a landlord's liability to a tenant occupying apartments in a tenement-house occupied by other tenants. It is sufficient for us to ascertain and state a rule governing cases such as that made by the evidence before us. We are satisfied that the authorities warrant us in adjudging that, where a stair-way connected with apartments hired in a tenement-house occupied by several tenants is rendered unsafe by temporary causes, such as the accumulation of snow and ice, the landlord is not liable to the tenant who uses such a stair-way with full knowledge of its dangerous condition, unless there is a contract on the part of the landlord to keep the premises in repair and fit for safe use. Any other rule would entail upon landlords a grievous and unjust burden, cast upon them a duty which long-settled rules have im-

posed upon the tenants, and result in imperilling the interests of an owner out of possession, and relieve those in possession of his property from that care which the law imposes upon bailees and others occupying analogous positions. If any other rule is adopted, then the owner is charged with the duty of watching steps leading to every part of the premises, and of keeping them free from all temporary obstructions; for let it once be granted that the landlord is liable for obstructions or defects not permanent and not growing out of the character of the structure, it will be impossible to draw any line, and he must be held accountable for all obstructions and defects, no matter how transient their character. Whether a landlord hiring apartments to many tenants is liable for latent defects, or for faults in the construction, or for permanent defects in the common passage-ways, we do not decide.

The evidence before us shows that the ice and snow made the stair-way unsafe, and caused the accident. But for the ice and snow, which the tenant could have removed with very little labor, or at a trifling expense, the appellant could have used the stair-way in perfect safety. We are satisfied that the court below was right in holding that the cause of the accident was the accumulation of ice and snow upon the stair-way, and that for an injury resulting from such a cause, a landlord who had made no covenant to repair is not liable.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Woods v. Naumkeag Steam Cotton Co.*, Massachusetts Supreme Judicial Court, March, 1888, certain steps leading from a tenement-house, occupied by plaintiff, who was the wife of a tenant at will of defendant, became slippery from the accumulation of ice and snow, and plaintiff slipped thereon, injuring herself. These steps were used in common by plaintiff, and other occupants and tenants of the premises. Held, that the defendant was not liable for the injury. If she were the sole tenant of the house, including the steps, the defendant would not be liable. A tenant who hires premises takes them as they are, and cannot complain that they were not constructed differently. *Dutton v. Gerriah*, 9 Cush. 89; *Royce v. Guggenheim*, 106 Mass. 201, 202; s. c. 8 Am. Rep. 382. There may be cases where the landlord is liable to the tenant for injuries received from secret defects which are known to the landlord, and are concealed from the tenant, but this case discloses no such defects in the steps. *Minor v. Sharon*, 112 Mass. 477; s. c. 17 Am. Rep. 122; *Looney v. McLean*, 129 id. 33. When the passage-ways are of artificial construction, as for example the halls and stair-cases of a house, and the owner lets part of the premises with the right to the tenants to use the passage-ways in common with others, it may be that there is an obligation on the owner to keep the ways in such a condition that they can be safely used by the tenants, but this obligation has never been extended so as to require a reconstruction of the ways on a different plan, if the ways as they existed when the premises were hired were not altogether convenient or safe by reason of some fault in the original plan which was apparent. In the case at bar, there was no duty on the part of the defendant to the plaintiff to remove from the step the ice and snow which naturally accumulated thereon. That was the tenant's duty, if

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she desired to use the steps. The ice and snow were the proximate cause of the injury. The defendant was under no obligation to change the original construction of the steps for the benefit of the tenant.

To same effect, *Krueger v. Ferrant* (20 Minn. 305), 43 Am. Rep. 222, and note, 227.

SIMS v. BARDONER.

(86 Ind. 87.)

Infancy — coverture — disaffirmance.

A woman, married in 1844 at the age of sixteen, joined with her husband in conveying her land a year afterward, he receiving the consideration. In 1861 she gave notice of her disaffirmance of the deed, her husband joining. Held a valid disaffirmance. (*See note, p. 272.*)

ACTION to quiet title. The opinion states the case. The defendant had judgment below.

A. F. Shirts, G. Shirts, H. Dailey and W. N. Pickerill, for appellant.

D. Moss, W. Neal, R. R. Stephenson and W. S. Christian, for appellees.

MORRIS, C. This suit, which is in the nature of a suit in equity, was brought by the appellant against the appellees, to ascertain her interest in, and quiet her title to, certain real estate situated in the county of Hamilton, and State of Indiana.

The complaint states that the appellant was, on the 24th day of July, 1844, married to the appellee John F. Sims, and that they have continued to be ever since husband and wife; that prior to their marriage she was the owner in fee simple of the west half of the north-west quarter of section 7, township 19, north, of range 5 east, in said county and State; that on the day and year aforesaid, the plaintiff and her said husband executed to Henry Bardoner a deed purporting to convey to him said real estate; that the appellee Peter Bardoner is the heir of said Henry Bardoner, who died intestate, and as such claims title to said real estate; that at the time the appellant and the appellee Sims executed said deed

to said Henry Bardoner she was a minor, of the age of sixteen years only, which was at the time known to their grantee; that when she arrived at the age of twenty-one years, she desired to disaffirm her said deed on account of her infancy at the time of the making of the same, but that her husband, John F. Sims, would not permit her to do so; that he was many years her senior, had great influence and control over her will, forbade her disaffirming said deed, refused to join her in giving notice of her desire to do so, and would not allow her to take any steps for the recovery of said land, he having received the consideration paid for said land, which was \$2.50 per acre, and appropriated the same to his own use without the appellant's consent; that he continuously refused to allow the plaintiff to take any steps to recover said land, or to give any notice to the grantee or his heir, the appellee Peter Bardoner, of her intention to disaffirm said deed, until the — day of March, 1881, when he joined her in serving a notice upon the appellee Peter Bardoner (said Henry Bardoner having previously died intestate, as aforesaid), of their disaffirmance of said deed. It is averred that the appellee Bardoner denies that the appellant has, or had, any right to disaffirm said deed; and denies that she has any interest in or title to said lands, claiming and giving it out in speeches that he is the absolute owner in fee of the same.

The prayer is, that the appellant's title to said land may be determined and quieted; that said deed, as to her, may be declared void, and for other proper relief.

The appellee Bardoner demurred to said complaint, for the want of sufficient facts. The court sustained the demurrer. The appellant refused to plead further, and final judgment was rendered upon the demurrer in favor of the appellees.

The sustaining of the demurrer to the complaint is assigned as error.

The deed executed by the appellant and her husband to Henry Bardoner operated as an absolute transfer to him and his heirs of the interest of the husband in said land, and entitled the grantee and his heirs to the possession of the land during the joint lives of the appellant and her husband. It follows, they being alive at the commencement of this suit, that the appellee Bardoner was then rightfully in possession of said land. This being so, the only suit which the appellant could have instituted at any time was a suit to ascertain her interest in, and quiet whatever title, if any, she might

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be held to have to said land. Assuming that the deed executed by the appellant had been so disaffirmed by her before the commencement of this suit, as to render it inoperative as to her, the time elapsed from the execution of the deed until the commencement of the suit would not bar the action ; such a suit, under the circumstances stated, might be brought at any time during the continuance of the estate of Henry Bardoner, or his heirs, as the grantee of the appellant's husband.

It follows therefore that at the time the appellant attempted to disaffirm said deed, her rights, if she had any, were not barred by any statute of limitations.

The deed executed by the appellant and her husband to Henry Bardoner was not void ; the deed passed the title, and was voidable only. The deed passed to the grantee the title of the appellant, subject to be divested by her subsequent disaffirmance of it within the proper time. Though the appellant might, perhaps, at any time after attaining her majority, and after the legislation of 1847, notwithstanding her continued coverture, have so disaffirmed the deed as to have enabled her to maintain this action, the question is, did she, upon the facts stated in the complaint, disaffirm the deed within the time allowed by law ?

As to what constitutes a reasonable time for avoiding a contract executed by an infant, the authorities are not quite agreed. In equity this may be done during infancy, so far at least as to enable the infant to recover the income of the estate conveyed. In the case of *Drake v. Ramsay*, 5 Ohio, 251, it was held that the deed of an infant may be disaffirmed at any time, so long as an action of ejectment is not barred by the statute of limitations. In the case of *Wallace v. Latham*, 52 Miss. 291, it was held that the more general rule upon the subject is that an infant executing a deed has until such time as will complete the bar of the statute of limitations after majority, to disaffirm it. Tyler on Infancy and Coverture says, p. 71 : "In case of coverture and the like, the deed of an infant may be disaffirmed within a reasonable time after the disability ceases, unless the party may have done something after age, and while the disability continued, to confirm it." He refers to *Sims v. Everhardt*, 102 U. S. 300. In the case of *Bigelow v. Kinney*, 3 Vt. 353 ; s. c., 21 Am. Dec. 589, it was held that in a case where all the equities were against the act of disaffirmance, the infant was bound by his voidable contracts, unless disaffirmed

within a reasonable time, and that eleven years after majority was not a reasonable time.

What constitutes the reasonable time within which a person who has executed a deed during infancy shall disaffirm it depends upon the particular circumstances of each case. The right must be exercised before the statute of limitations has become a bar to an action to recover the land conveyed, and it may be, under the circumstances of the particular case, that it should be exercised within a shorter period. It is the disaffirmance which avoids the deed of the infant, and not the bringing of the action to recover the land conveyed.

In the case of *Miles v. Lingerman*, 24 Ind. 385, it was held that the deed of an infant *feme covert* might be avoided within a reasonable time after she became discoverd, she having done nothing during coverture in affirmance of the conveyance. The court says: "Under our present statute the wife may bring her action in regard to her own estate as though she were a *feme sole*; still our legislature has seen proper to continue the protection formerly accorded to her as a *feme covert*; although as to her power to disaffirm her contracts made during minority her legal disability has been removed. She has the legal power to disaffirm her contracts made during infancy, and to bring her action without the assent, and even against the will of her husband. But the legislature has not required her to exercise that power during coverture. It might result indeed that the exercise of that power, without the consent of the husband, would impair the harmony of the marriage relation. The law therefore having empowered the wife to act, is still careful not to require such action as might perhaps imperil her domestic peace, in the effort to secure her property. We do not decide that there may not be circumstances under which, having the legal power to act, the neglect to do so would amount to a fraud upon third parties, and prevent any after-disaffirmance of her conveyance. Nor do we decide that even her failure to act, under such circumstances, would be an affirmance of the deed, and pass from her a title, which our statute declares can only be divested by a conveyance in which her husband has united."

It is intimated, though not decided, that the wife, having the power to disaffirm, may be required to do so if her failure would operate as a fraud upon others; but where she does nothing in

affirmance of the deed, it is difficult to see how her mere silence, induced through the controlling influence of her husband, can be construed as a fraud, requiring her to exercise a right before the same has been barred by any statute.

In the case of *Doe v. Abernathy*, 7 Blackf. 442, after citing several conflicting cases upon the question as to whether an infant is, upon coming of age, bound to disaffirm a deed made during minority, within a reasonable time, or may do so at any time before the statute of limitations becomes a bar, the court declined to decide the question, but held that in that case, the right to disaffirm, having been exercised within five years, was under the circumstances of the case exercised within a reasonable time. It is obvious that the court, in holding that the right to disaffirm had been exercised within a reasonable time, took into consideration the fact that the infant grantor had, at or about the time of her majority, become *covert*.

In the case of *Hartman v. Kendall*, 4 Ind. 403, Michael Robbins and Rebecca, his wife, who was then seventeen years of age, conveyed certain real estate to Hartman. It was unimproved when conveyed. In 1837 Rebecca attained her majority, and in that year her husband died. She remained a widow for ten years; lived in the near vicinity of the land. In 1847 she married Tubal Kendall, and she and her husband continued to live near the land until 1850, when they demanded dower in the land. Hartman had constantly and greatly improved the land. The question was, whether under the circumstances the acquiescence of Rebecca for thirteen years amounted to an affirmance of the deed. The court, says: "It" (avoidance) "must take place in this State within twenty years, or the statute of limitations will be a bar. May circumstances estop a party from asserting the right of avoidance even within that time, and if so, what are they?" Again the court says: "In the case now before the court, there must be a decision as to the effect of thirteen years' acquiescence, by a party living in the vicinity of the land, with full knowledge of her rights (for where the facts are known all are bound to know the law arising upon them), and with easy opportunity to notify the tenant in possession of an intention to disaffirm, and while improvements were being made by that tenant in the belief that his title was complete; and we think that effect is to preclude the grantor from exercising the right to avoid her deed."

It is evident that the conclusion reached was the result of the peculiar facts and circumstances of the case. But for these circumstances, which operated as an estoppel, the conclusion, it may be fairly inferred, would have been different.

The only question decided in the case of *Law v. Long*, 41 Ind. 586, and the only one upon which it can be regarded as authority, is, must a party disaffirm a deed executed during minority before bringing his action to recover the land? This question was decided in the affirmative. Other questions are discussed in the case, but it was decided upon that above stated. The case of *Miles v. Lingerman*, 24 Ind. 385, is alluded to with seeming approval, certainly without the slightest intimation of disapproval.

In the case of *Scranton v. Stewart*, 52 Ind. 68, the appellant sought to recover the possession of the land in dispute, upon the ground that when she and her husband conveyed it, she was an infant and a *feme covert*. Notice of disaffirmance had been given within five years after the grantor became of age, and the court held it to be within a reasonable time. The judge who prepared the opinion in that case says that if it was held in *Miles v. Lingerman*, *supra*, that the law did not require a married woman to disaffirm her deed made when an infant, and while under coverture, during coverture, it is not the law. He further says, that in *Law v. Long*, *supra*, "it was said that the authorities all agree that the contract must be disaffirmed within 'a reasonable time.' * * * An examination of the above authorities will show that the time required ranges from one to twenty years, according to the peculiar circumstances of each case and the views of different judges and writers." If we substitute the words "until barred by the statute of limitations" for the words "twenty years" in the above statement, it may perhaps be regarded as a correct statement of the law.

Schouler, in his recent work on Domestic Relations, p. 585, says: "Where land had been sold by an infant, it was said in a Connecticut case years ago, the period of acquiescence being thirty-five years, that the infant ought to declare his disaffirmance within a reasonable time; and similar *dicta* may be found in other courts; but there seems to be no doubt upon the decided cases, that mere acquiescence is no confirmation of a sale of lands unless it has been prolonged for the statutory period of limitation; and that an avoidance may be made any time before the statute has barred an entry."

The above is, we think, an accurate statement of the general

rule upon the subject. It was so held in *Hartman v. Kendall*, *supra*. If the party entitled to disaffirm stands by and sees improvements about to be made or money about to be expended upon the land, he must act promptly in asserting his rights; if he does not he may be estopped, even in one year. But if he does not stand by, if he does nothing in affirmance of the deed and is not called upon by peculiar circumstances to assert his rights, he may disaffirm at any time before his right of entry is barred.

It is true that lapse of time, short of the period of limitation, with slight circumstances, has been held sufficient to sustain an infant's deed; but these cases confirm the general rule. In Illinois and some other States the question is regulated by statute.

The recent case of *Sims v. Everhardt*, 102 U. S. 300, decided in 1879, is in point. Ann M. Sims was married to John B. Sims, July 14, 1844. She was born September 25, 1828. Her father, April 3, 1845, conveyed to her the land in dispute in fee, and on the 28th day of May, 1847, she and her husband conveyed the land to Magdalena Everhardt. Mrs. Everhardt went into immediate possession of the land, paid taxes and a mortgage on the property, and continued in possession, making improvements, until 1871, when she died. The defendants to the suit were her devisees. At the time the deed was made Mrs. Sims stated in writing that she was of age; that she made the statement to induce Mrs. Everhardt to purchase the land. There was evidence in the case that she had been badly treated by her husband before the deed was made; that she was afraid of him; that a look from him would make her do almost any thing. On the 14th of February, 1870, she obtained a divorce from her husband for his fault. In April following she disaffirmed her deed to Mrs. Everhardt. Justice STRONG, who prepared the opinion in the case, reviewed the decisions of this court upon the subject, and concludes, correctly we think, that they do not establish the rule that a married woman who had executed a deed with her husband when an infant, conveying her real estate, must disaffirm the same within a reasonable time after attaining her majority. In speaking of the case of *Scranton v. Stewart*, 52 Ind. 68, the court says: "The Supreme Court held that her disaffirmance was in time. It is all the case required. But the judge went on to declare that a married woman who has made a deed of her lands during her infancy and coverture must disaffirm it within a reasonable time after she arrives at age, notwithstand-

ing her coverture, and that the fact of the continued coverture would not extend the time for the disaffirmance. All this was *obiter*." The court approves the rule as stated in *Miles v. Linger-man, supra*.

The court further says: "When the deed was made, she," Mrs. Sims, "was laboring under a double disability,—infancy and coverture. Even if her deed and that of her husband had not conveyed his marital right to the possession and enjoyment of the land, she would have been under no obligation, imposed by the statute of limitations, to sue until both the disabilities had ceased; that is until after 1870. It is an acknowledged rule that when there are two or more co-existing disabilities in the same person when his right of action accrues, he is not obliged to act until the last is removed. 2 Sugden Vendors, 103, 482; *Mercer's Lessee v. Selden*, 1 How. 37."

The above rule seems to have been overlooked by BUSKIRK, C. J., in *Scranton v. Stewart*. It is not the tacking of one disability to another, but claiming, in accordance with the obvious meaning and spirit of the statute, the longer of two existing disabilities. How can it be said, that the removal of the less of two co-existing disabilities shall have the effect to terminate the greater? The joinder of the husband in the execution of the deed prevented the running of the statute of limitations, and no reason can be perceived why it should be held that her coverture is removed as to the disaffirmance of her deed. Bishop, in his work on Married Women, vol. 2, § 516, says: "If the infant is also a married woman, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended." *Dodd v. Benthal*, 4 Heisk. 601; *Matherson v. Davis*, 2 Cold. 443. Schouler (p. 589) agrees with Bishop.

In the case of *Drake v. Ramsay, supra*, the court held that mere lapse of time would not of itself take away the right to disaffirm the deed of an infant, until his right of entry became barred by the statute of limitations. To the same effect are the following cases: *Cresinger v. Welch*, 15 Ohio, 156; *Irvine v. Irvine*, 9 Wall. 617; *Prout v. Wiley*, 28 Mich. 164.

In *Sims v. Everhardt, supra*, the Supreme Court held that Mrs. Sims, having done nothing in affirmance of her deed, and being under coverture and in fear of her husband during her marriage, had a right to disaffirm her deed within a reasonable time after her

coverture ceased. The court rested its decision upon the peculiar circumstances of the case, but it is obvious, from the reasoning of the court, that it would have held, had the exigencies of the case required it, that she had, aside from these circumstances, a right to disaffirm after her coverture ceased.

It may be doubtful, under the law as it stood at the time when the deed in this case was made, whether the appellant has the power to effectually disaffirm her deed without the consent of her husband. We need not however decide this question. Nor need we decide that generally a married woman may disaffirm her deed, made during infancy, within a reasonable time after her coverture ceases. The question is, whether the appellant did disaffirm her deed within a reasonable time after she attained her majority. We say, in the language of Judge STRONG, that "What is a reasonable time is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case." *State v. Plaisted*, 43 N. H. 413; *Jenkins v. Jenkins*, 12 Iowa, 195; *Stringer v. Northwestern M. L. Ins. Co.*, 82 Ind. 100.

It is said that the appellant has stood by for thirty-three years after becoming of age. This is a mistake. There is nothing in the complaint which shows, or tends to show, a standing by, in the legal sense of the words, on the part of the appellant. On the contrary, according to the allegations of the complaint, she is still under coverture. Her husband received the entire consideration for the land conveyed; she was under his control, and he refused to permit her to disaffirm her deed, although he knew she desired to do so; he had great influence over her and restrained her from disaffirming the deed until shortly before the commencement of the suit. She has done nothing in affirmance of the deed. Her grantee knew, at the time the deed was made, that she was an infant and a married woman, as did the appellee, who takes by descent from her grantee. Under these circumstances, though the deed was not disaffirmed until thirty-three years after the appellant had attained her majority, we think she acted within a reasonable time. If there was any standing by on the part of the appellant, if she knew that improvements were being made or that money was about to be expended upon the land, these facts, or any others tending to estop the appellant from exercising her right to disaffirm, should be brought forward by answer. They do not appear

in the complaint. We think the court erred in sustaining the demurrer to the complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees.

Judgment reversed.

NOTE BY THE REPORTER. — To the same effect, *Watson v. Billings*, 36 Ark. 278; a. c., 48 Am. Rep. 1; *McMorris v. Webb*, 17 S. C. 558; a. c., 48 Am. Rep. 620.

The following is an abstract of *Sims v. Everhardt*, *supra*: Complainant S., a married woman, and an infant, in 1847 joined with her husband in conveying, for a valuable consideration, lands belonging to her, to E. At the time, complainant signed a statement that she had attained her majority. The husband had by threats induced her to join with him in selling the lands. She became of age in 1849. In 1870 she procured a divorce from her husband for his wrong, and immediately thereafter, for the first time, disaffirmed the conveyance to E., and brought suit to recover the lands. At the time complainant acquired title to the lands, as to the rights of married women the common law prevailed in Indiana, where they were situated, though laws giving to married women the control of their separate property were passed in 1847 and 1852. The wife did no act affirming the sale. Held, that she was entitled to recover the lands. By the marriage, complainant's husband acquired a vested freehold interest in her lands, and became entitled to the rents and profits. His control over the usufruct thereof became absolute. His interest extended during the joint lives of himself and his wife, or at least so long as the marriage relation continued. It was an interest capable of sale. When therefore the deed was made to E., it gave to the grantee the wife's right, subject to disaffirmance, and the husband's right to the possession and enjoyment of the profits absolutely. When the wife subsequently came of age she continued powerless to disturb the possession of the grantee so long as her coverture lasted, for the grantee held not only her right but that also of her husband. The most she could have done was to give notice that she would not be bound by her deed. That she was not bound to do. The land was not her separate estate. In regard to it she was *sub potestate viri*, incapable of suing or making any contract without her husband's assent, except such as might relate to separate property. She could not even receive a grant of land if her husband dissented. Her disability during her coverture was even greater than that of an infant, and it is settled that an infant cannot disaffirm his deed while his infancy continues. *Zouch v. Parsons*, 8 Bur. 1806; *Roof v. Stafford*, 7 Cox 183. The reason is, that a disaffirmance works a reversion of the estate in the infant and he is presumed not to have sufficient discretion for that. Why should not the greater disability of coverture be attended with the same consequences? If a wife cannot contract about any land which is not her separate property, how can she, without the concurrence of her husband, do any act, the effect of which is to transfer the title to land from another to herself? The question is whether complainant did disaffirm her deed within a reasonable time after she attained her majority. What is a reasonable time is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case. *State v. Platsted*, 43 N. H. 413; *Jenkins v. Jenkins*, 12 Iowa, 195. It is an acknowledged rule that when there are two or more co-existing disabilities in the same person when his right of action accrues, he is not obliged to act until the last is removed. 2 Sugd. on Vend. 108 (489); *Mercer v. Selden*, 1 How. 53. This is the rule under the statute of limitations. But complainant could not sue until after her divorce, and until the right the husband acquired by his marriage terminated. And had she given notice during her coverture of disaffirmance of her deed, it was in the power of her husband to disaffirm her disaffirmance. 2 Bish. on Marr. Wom., § 392. Giving notice therefore, which was all she could do, would have been a vain thing. The law does not compel the performance of things that are vain. Bishop, in the work referred to, says that if an infant, who is also a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended. § 516. In support of this he refers to *Dodd v. Benthal*, 4 Heisk. 601, and *Matheron v.*

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Davis, 3 Cold. 442. These cases certainly sustain the rule stated. In the former it was decided that an infant, who is also a married woman, has the option to dissent from her deed within a reasonable time after her discovery, though her coverture may continue more than twenty years. And if this were not so, the disability of coverture, instead of being a protection to the wife, as the law intends it, would be the contrary. But the continued coverture of complainant, after she attained full age, is not the only circumstance of importance to the inquiry whether she disaffirmed her deed within a reasonable time. The circumstances under which the deed was made are to be considered. There was evidence that she was constrained by her husband to execute the deed; that his conduct toward her was abusive, violent, and threatening in order to induce her to consent to the sale; that she was intimidated by him; that a look from him would make her do almost any thing, and that she was in a weak and nervous condition. It is not strange that a woman bound to such a husband should delay during her coverture disaffirming a contract which he had forced her to make. The most that is alleged against her is that she was silent during her coverture. But silence is not necessarily acquiescence. It is true that the decisions respecting the disaffirmance of an infant's deed are not in entire harmony with each other. While it is generally agreed that the infant to avoid it must disaffirm it within a reasonable time after his majority is attained, they differ as to what constitutes disaffirmance and as to the effect of mere silence. Where there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after his reaching majority until he is barred by the statute of limitations, and that silent acquiescence for any period less than the period of limitation is not a bar. Such was in effect the ruling in *Irving v. Irving*, 9 Wall. 627. See also *Prout v. Wiley*, 28 Mich. 164, a well-considered case, and *Drake v. Ramsey*, 5 Ohio, 251. But on the other hand, there appears to be a greater number of cases which hold that silence during a much less period of time will be held to be a confirmation of the voidable deed. But these cases either rely upon *Holmes v. Bogg*, 3 Taunt. 35 (which was not a case of an infant's deed), or subsequent cases decided on its authority, or they were rested in part upon other circumstances than mere silent acquiescence, such as standing by without speaking while the grantee has made valuable improvements, or making use of the consideration for the deed. The preponderance of authority is that in deeds executed by infants, mere inertness or silence, continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed. And those confirmatory acts must be voluntary. As was said, one who is under a disability to make a contract cannot confirm one that is voidable, or what is the same thing, cannot disaffirm it. Affirmance or disaffirmance are in their nature mental assents. They necessarily imply the action of a free mind, exempt from all constraint or disability. The complainant, having been a *feme covert* until 1870, and never having done, during her coverture, any act to confirm the deed which she made during her infancy, could effectively disaffirm it in 1870, when she became a free agent, and her notice of disaffirmance and her suit avoided her deed made in 1847. And she was not estopped by her statement that she was of age. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown v. McCune*, 5 Sandf. 228; *Keen v. Coleman*, 39 Penn. St. 209. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed.

See *Quinn v. Haddock*, ante, 242.

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(88 Ind. 111.)

Negligence — contributory — travelling on defective highway.

A traveller, knowing the dangerous condition of a highway, is not necessarily negligent in persisting in travelling upon it. (*See note, p. 276.*)

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

J. H. Mellett and E. H. Bundy, for appellant.

J. Brown, for appellee.

BLACK, C. This was an action to recover damages for an injury to the person of the appellee, occasioned by a defect in the appellant's turnpike, while the appellee was travelling thereon. There was an answer of general denial, and the issue thus formed was tried by a jury. The verdict was in favor of the appellee. Appellant moved for a new trial. The motion was overruled, and judgment was rendered on the verdict. The overruling of the motion for a new trial is assigned as error.

Counsel have argued the questions whether the verdict was sustained by sufficient evidence, and whether the court erred in refusing to give the jury certain instructions asked by appellant.

Appellee's injury was caused by the overturning of his buggy, in which he was driving on appellant's road, at a place where the road was crossed by a culvert. There was evidence that the general width of the turnpike on its surface was from eighteen to twenty feet; that at the culvert, and for some distance either way from it along the highway, there was a "fill," the grade at the culvert being about twelve feet high, and as originally made, from sixteen to seventeen feet wide on the surface; that at each end of the culvert the earth had caved in or washed out; that in the middle of the road, over the culvert, there was a depression, and the road slanted toward the south side; that the space on which the vehicles might be and were driven over the culvert was from eight feet to nine feet wide, and a person driving over it "had to make a straight drive or go off"; and that there was no safe way to drive

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around the culvert. When the head of appellee's horse was about even with the culvert, he shied toward the south, and the buggy ran into the excavation on that side, and was overturned, and appellee was injured, as alleged in his complaint. The cause of the horse's fright was not certainly stated, but there was evidence from which the jury might have inferred that it was the noise of bubbling water. The horse did not go down the embankment. There was evidence that the horse was gentle.

The culvert had been in its bad condition for several months, and appellant, during all that time, had notice of its condition, and kept a toll-gate near by, where tolls were collected from travellers.

Appellee had frequently driven over the culvert while it was in that condition, and he considered the place dangerous. For some time before he was injured he had been careful in driving over this place. He thought there was danger that his buggy might sink down or go over at either end of the culvert. Appellee's injury occurred between nine and ten o'clock in the morning. There was evidence from which the jury might have found that, at the time of the injury, appellee was driving carefully, with a view to the dangerous condition of the road.

It is insisted on behalf of appellant, that as the evidence showed that appellee had previous knowledge of the defect in the highway which caused his injury, he could not recover; and that the court should have given the instructions asked, which, in different forms, stated that if appellee had such knowledge he could not recover.

We need not take space to review the authorities on the question thus proposed by counsel, for it has been decided by this court, in several recent cases, contrary to the position taken by appellant's counsel. See *Toledo, etc., Ry. Co. v. Brannagan*, 75 Ind. 490; *City of Huntington v. Breen*, 77 id. 29; *Murphy v. City of Indianapolis*, 83 id. 76; *Wilson v. Trafalgar, etc., Co.*, id. 226.

These cases settle the doctrine in this State, in harmony with authorities elsewhere, that one is not required to forego travel on a highway merely because he knows it to be dangerous, or to show that in the use of a highway known by him to be dangerous, he used extraordinary care to avoid an injury, for which he seeks to recover damages; but he should be careful in proportion to the danger of which he has knowledge, and may proceed if it be consistent with reasonable prudence to do so; and it will generally be a question for the jury whether he used reasonable care, his knowl-

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edge of the defect in the highway being a circumstance to be considered with other circumstances in determining whether he used reasonable care.

Under the circumstances of this case, it would have been error to instruct, as asked by appellant, that appellee could not recover if he knew of the defect in the highway. The court instructed that the plaintiff was required to prove that he himself used ordinary care, and did not by any negligence of his contribute to the injury. If appellant desired an instruction upon the subject of appellee's previous knowledge, an instruction with proper qualifications should have been asked.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be, and it hereby is, affirmed, at appellant's costs.

Judgment affirmed.

NOTE BY THE REPORTER. — See *Braker v. Town of Covington*, 69 Ind. 33; s. c., 35 Am. Rep. 202; *Schaefer v. City of Sandusky*, 33 Ohio St. 246; s. c., 31 Am. Rep. 533; *Dewire v. Bailey*, 131 Mass. 109; s. c., 41 Am. Rep. 219. The doctrine of the principal case is substantially that of *Mackenzie v. City of Northfield*, Supreme Court of Minnesota, June, 1883, where it was laid down that previous knowledge that a street or crossing was out of repair does not conclusively establish contributory negligence on the part of a person travelling over it, and who is injured in consequence of its unsafe condition. The court said: "It was held in *Estelle v. Lake Crystal*, 27 Minn. 243, and in *Kelly v. R. Co.*, 28 id. 98, that previous knowledge that a street or crossing was out of repair does not conclusively establish contributory negligence on the part of a person travelling over it, and who is injured in consequence of its unsafe condition. And this, we think, substantially disposes of the principal point in this case. The plaintiff has been accustomed to pass over a sidewalk in the city of Northfield, in going to and from his house, daily for several years. A portion of this walk near his house, made of old materials, has been for a long time out of repair, of which the defendant had notice. The walk was four feet wide, made of plank, laid lengthwise upon sleepers raised up from the ground, leaving a space of a foot or more between them and the ground. Some of the outside planks were imperfectly nailed, and for that reason for a short distance plaintiff was accustomed to walk upon the middle planks, which were more secure. On the night of December 4, 1881, while passing over the walk on his way to church, plaintiff stepped upon a plank, which unexpectedly to him broke, and his foot passing through was caught in the walk, causing him to fall backwards and to suffer severe and permanent bodily injury. The evidence tends to show that plaintiff was familiar with the walk and its general condition, that he was accustomed to exercise care in passing over it, and that he was proceeding carefully at the time of the accident, and that he had no reason to apprehend that the plank through which he fell was likely to break as it did, or that he might not safely pass over the walk with the exercise of ordinary care. He might have left the sidewalk and travelled the street on that occasion, though the ground was rough and frozen, and unpleasant to walk over. It was not unreasonable however that the plaintiff should have chosen to take the sidewalk in the confident expectation that with his knowledge of its character, he might pass over ... safely as usual. And it would appear from the evidence that he was not conscious of any danger. While all the circumstances were proper for the jury to consider on this question, it was not so plain a case that any danger would result to plaintiff from passing over the walk with the care which the evidence shows he was accustomed to exercise, and did exercise at that time, as to warrant the court in saying,

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as matter of law, that he did not exercise ordinary prudence in venturing upon it, or that he was guilty of contributory negligence. *Evans v. Utica*, 60 N. Y. 166; s. c., 35 Am. Rep. 166; *Mahan v. R. Co.* 73 id. 585; *Estelle v. Lake Crystal*, *supra*; *Kelly v. R. Co.*, *supra*."

So, too, in *City of Aurora v. Hillman*, 90 Ill. 61, the court said: "It is also claimed by appellant, that appellee was guilty of a degree of contributory negligence which will prevent his recovering. The sidewalk was intended for foot passengers, and the carriage-way in the street was intended for horses and vehicles. It is true, pedestrians would have a right to cross over the street or road, and their right to do so, at least at the usual street crossings, would be equal to that of persons with teams to drive along the street, and cities are bound to keep such crossings in a safe condition: but we are not prepared to hold a pedestrian has an equal right with one who drives a carriage to travel in and along the drive-way of a public street, or that a city is under any obligation to keep such drive-way, longitudinally, in a fit and safe condition for pedestrians. We assuredly cannot hold appellee was guilty of negligence in not taking the middle of the street. Had he done so, a driver would have been liable if he had wilfully or negligently driven over him, but a relatively higher degree of care would have been required of the pedestrian, and so far as the city is concerned, it would have assumed but little, if any responsibility for his safety. Nor does the mere fact the plaintiff might have taken a better and safer sidewalk than the one he did take charge him with want of ordinary care. He travelled the usual and most direct route to and from his work. In *Lovenguth v. City of Bloomington*, 71 Ill. 383, the plaintiff not only knew the sidewalk was in an unsafe condition, but there was another sidewalk to his boarding place which was entirely safe and secure, and the distance was no greater, and then he attempted to get over a place where some planks were gone and others were loose, with a skip or jump. The court said in that case: 'Upon the evidence submitted, it was a question for the jury to determine whether the accident occurred from the negligence and want of proper care on the part of plaintiff, or from the neglect of the city to keep in repair a sidewalk.'" Followed in *City of Bloomington v. Chamberlain*, 104 Ill. 306, distinguishing *City of Centralia v. Krouse*, 64 id. 19.

The same doctrine was recognized in *Thomas v. Mayor, etc.*, 38 Hun, 110 a case of an icy sidewalk. The court said: "It is undoubtedly the law that the plaintiff in an action of this nature must appear to be free from fault before he can have any right to maintain it, and if he attempts to cross a body of ice of this nature when he himself understands it to be dangerous to do so, and an accident is caused by the attempt, no action for redress can be sustained by him. *Wilson v. City of Charlestown*, 8 Allen, 137; *Durkin v. Troy*, 61 Barb. 437; *City of Quincy v. Barker*, 51 Ill. 300; *Schaeffer v. Sandusky*, 33 Ohio St. 246; s. c., 31 Am. Rep. 533. And the conduct of the plaintiff precisely accorded with this principle when his mind was upon the subject of this body of ice. But that was not the case when his injury seems to have been produced, for then the walk was crowded, and that would be a circumstance tending to divert the attention of the party from the existence of the ice, although it had been observed by him on the preceding Saturday. He was not necessarily obliged so to impress his recollection as to keep this fact before it at the peril of being chargeable with negligence for not remembering it upon the occasion in controversy. The law does not require that extreme degree of mental vigilance of persons making use of a public sidewalk. Their thoughts may be employed upon subjects of interest or importance to themselves, or wholly diverted by observations directed to other persons making the same use of the walk, without being necessarily held to be negligent." Citing *Driscoll v. Mayor, etc.*, 11 Hun, 101; *Darling v. Mayor, etc.*, 18 id. 340; *Evans v. City of Utica*, 60 N. Y. 166; s. c., 35 Am. Rep. 166. "As the evidence appeared in this case, the jury might infer from the facts as they were related, if that was believed to be truthful, that the plaintiff was not careless or negligent in attempting to cross the ice, although he had previously seen it and then concluded it to be dangerous. Whether he was so or not would depend upon the credit which might reasonably be given to his evidence. If the jury should believe that his attention was diverted from the danger of this locality by the crowd upon the sidewalk, or by any other circumstance or mental condition, not involving a failure to observe ordinary care, he would not be precluded from maintaining his action simply because this place appeared to him to be dangerous on the Saturday before, and he on that day crossed the street for the purpose of avoiding it." A nonsuit was set aside.

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The like doctrine was held in *Oeage City v. Brown*, 27 Kans. 74. The court said: "The defendant asked the court to instruct the jury, 'that if they believed from the evidence the plaintiff knew before and at the time he was injured of the existence of the offset between the nine-foot and four-foot sidewalk, at the point where he was injured, and passed that point in a thoughtless and careless manner, under no effort to guard against danger or injury, he could not recover in the action.' This was refused, but in its place the court directed the jury, 'that every person passing over the sidewalk of a city is required to exercise such care and diligence in doing so as men of ordinary care and diligence would use under similar circumstances. In determining whether plaintiff used such care at the time he received the injuries complained of, it would be proper to consider his knowledge of its condition; the time; the light or darkness at the time and place the injuries were received, and his manner of travelling, and any other fact appearing from the evidence which would tend to show such care, or the want of it;' and further charged them that if they found from the evidence that the plaintiff materially contributed to such injury by such negligence, they would find for the defendant. We think the instruction given by the court was the true declaration of the law, considering all the facts of this case, instead of the one asked for on the part of the city. If the injured party was familiar with the sidewalk, and knew of the hole or opening in the offset, and the accident had occurred in the day-time, perhaps these facts might have raised such a presumption of negligence on his part that he would have been bound by proper proof to negative such presumption. But the court had no right to say, upon the facts stated, as a matter of law, that the injured party could not recover. It was for the jury to judge, from all the circumstances concerning the case, whether the plaintiff was guilty of such ordinary negligence contributing to his injury as would defeat his recovery, and the court called the attention to such matters as they were bound to consider to decide this question."

In *Griffin v. Auburn*, 58 N. H. 121, the court refused to instruct that if the plaintiff knew the east track of a highway to be perfectly safe, and the west track to be dangerously near a tree and rocks, and voluntarily chose to drive on the west track, he did not use reasonable and ordinary care. This was approved and a verdict for the plaintiff was sustained. The court said, "It was not a question of law."

The contrary was held in *City of Erie v. Magill*, Pennsylvania Supreme Court, Dec., 1882, an action against a city for injuries from slipping off an icy sidewalk. Held, that the following charge was not error. "Whatever may have been the condition of the street, or however dangerous, if the plaintiff knew of such danger and could have avoided it by turning aside or by going on the opposite side of the street, but instead of doing so chose to run the risk of passing over the dangerous spot, and so encountered the hurt and injury complained of, she would be guilty of what is called in the law contributory negligence, and your verdict should be for the defendant." The court cited *Pennsylvania R. Co. v. Ogier*, 11 Casey, 60; *Catawissa R. Co. v. Armstrong*, 9 P. E. Smith, 282; *Pittsburg, &c. R. Co. v. McClurg*, 6 id. 284; *McKee v. Bidwell*, 24 id. 218; *Goshorn v. Smith*, 11 Norris, 435; *Baker v. Fehr*, 1 Out. 70. The court said: "In *Wilson v. City of Charlestown*, 8 Allen, 137, it was held that a person who voluntarily attempts to pass over a sidewalk which he knows to be very dangerous by reason of ice upon it, when he might easily avoid it, cannot maintain an action against the town, which is bound to keep the way in repair, to recover for injury sustained by falling upon the ice. The court says: 'It is settled that if a person knows a way to be dangerous when he enters upon it, he cannot in the exercise of ordinary prudence proceed and take his chance, and if he shall sustain damage look to the town for indemnity.' In *City of Centralia v. Krouse*, 64 Ill. 19, the court says: 'Having undertaken to go where he knew it was positively dangerous, it must be held that he did so at his own peril. It is not denied that he could have gone to the point where he desired to go by a safe route, by going only a short distance further. It was his plain duty to have taken the safer course. This he declined to do, but chose to go where he himself knew that it was dangerous, and the injury that resulted must therefore be attributed to his want of proper care and caution.' In *Durkin v. Troy*, 61 Barb. 437, the court says: 'Now the foundation of the plaintiff's cause of action, if he had one, is that this piece of ice was a dangerous obstruction to the passage of those using the sidewalk for that purpose, which the city was bound to remove, and the danger consisted in liability to those who stepped upon it to slip and fall. The obstruction was therefore one to be avoided by

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those using the sidewalk and seeing or being able to see the ice, and if it could readily be avoided, the failure to avoid it by one using the sidewalk and plainly seeing the obstruction must be accounted negligence.' In *Butterfield v. Forrester*, 11 East, 60, Lord ELLENBOROUGH, C. J., said: 'A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right.'" Three judges dissented.

In *Twogood v. Mayor, etc.*, New York Common Pleas, 1883, the court said: "The facts show that the plaintiff, a lady, walking through Christopher street, on the south side, on reaching the sidewalk which adjoins the Christopher Street Park and commencing to walk upon it, observed that it was covered with irregular snow and ice; though all the other sidewalks and crossings in her view were clear, and this spot was the only obstructed one she had met with, she walked on at her regular gait until near the center of the park, when suddenly her foot slipped and she fell and broke her arm; she fell on ice; it was all intended, whether in flakes or large pieces she could not say; she states that when she slipped on the sidewalk there was nothing that presented the appearance of an accumulation of snow and ice; and that when she slipped on the irregular mass of snow and ice which she reached, it did not appear to be dangerous or slippery. The accident occurred on a fine day between twelve and one o'clock on January 20, 1881; snow had fallen on eight days between December 23, 1880, and that date, and rain or sleet on three or four days; the last storm was on the 14th. The plaintiff's son described the condition of the sidewalk on the 30th, the day of the accident, and for several days before. There were three feet of passage-way, about three feet wide, covered with ripply ice about three inches thick; it looked as though sleet fell and considerable drifting and had frozen where a person had put his foot, and slush washed up in ripples; that was about three feet next to the railing; the balance of the walk was snow; as it fell there was sleet or rain frozen on top, making a hard crust; the snow had been trodden down and made very irregular. The policeman on duty observed and reported 'snow and ice not removed' from the walk around this park from the 15th to the 20th of January. It thus appeared that this sidewalk was covered with ice and snow, and that the dangerous and slippery condition must have been apparent upon the most casual inspection on a fine day between the hours of twelve and one. It also appeared from the evidence of the plaintiff herself that all the other sidewalks and crosswalks in view were clear; and this spot around the park was the only obstructed spot she met with. It appeared from the testimony of the patrolman that the sidewalk on the opposite side of Christopher street was clear. The same fact appears in the evidence of plaintiff's son, and his evidence, her own and the patrolman's show that she could have crossed the street and walked on the other side without encountering ice and snow. The plaintiff, having the choice of a clear sidewalk and one covered with ice, chose to continue her walk upon the latter, after observing its condition when she reached it. She took the risk of making the passage in safety, and after proceeding about half the distance, slipped and fell. To make the city liable in damages for an accident of this character, which presents no extraordinary feature of city travel in winter, is to make it an insurer against any of the risks that pedestrians may choose to take. The duty of the city is to use reasonable care in removing obstructions in the streets; but a slippery sidewalk, caused by a fall of snow and its subsequent thawing and freezing, is not in any sense an obstruction. Such a condition of the streets is to be taken into account by pedestrians, and something more must be shown to make the city liable." A verdict for the defendant was sustained.

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(38 Ind. 172.)

Set-off — of judgments — exemption — champerty.

An attorney, having a lien by statute for services in procuring a judgment, has a superior right to that of the judgment debtor to set off a judgment acquired by him against the client.

Where a judgment debtor has no property save a judgment for less than the amount exempted by statute from execution, the defendant in that judgment may not satisfy it by set-off of another judgment.

A judgment founded on contract may be set off against one founded on tort.

An assignment of a judgment to one who has illegally furnished money to carry on the action is subject to the right of the judgment debtor to set off a judgment against the assignor.

ACTION to set off judgment. The opinion states the case. The defendant had judgment below.

W. H. Thompson and J. M. Thompson, for appellants.

A. D. Thomas, J. W. Shelton and J. R. Courtney, for appellees.

ELLIOTT, J. The complaint of the appellants alleges that they are the owners, by assignment, of several judgments against Jacob Beard; that Beard has a judgment against them, and that they were entitled to have the judgments owned by them set off against that obtained against them by him.

The appellees severed in their answers, and the case has three distinct branches, the questions in each being different. We shall first consider the questions presented by the answers of Thomas, Shelton and Courtney. The substance of their answers is, that that they were the attorneys of Jacob Beard, and as such obtained his judgment against appellants for an assault and battery committed upon him; that their services were for the aggregate value of \$335; and that at the time of the rendition and entry of the judgment they filed liens according to law.

The question which these answers present is, whether the lien of an attorney for services rendered in the action which results in the judgment sought to be discharged by setting off judgments against the client is superior to the rights of the judgment defendants

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vested in them by judgments acquired by assignment. We feel no hesitation in declaring that the attorneys have the better and senior right. Their services secured the judgment for their client, and upon the principle which gives a mechanic who manufactures an article a paramount right, they should receive their reward. It is no fanciful analogy that likens the rights of an attorney to such cases, for in a limited sense, his services create his client's judgment. Considerations of public policy require such a result. If a man is overburdened with debt, as John Beard was, and is grievously beaten, as Beard was, he might be utterly unable to secure the services of an attorney to prosecute his action, and thus the wrong-doer escape civil responsibility, and a legal right go unredeemed. It is not here a question of ethics but of law; it is not a question as to whether an attorney should, for the honor of his profession, stand for a suitor without reward; the question is one of right, for by our law, an attorney is entitled to just compensation for his services and a lien for its security.

As our statute gives a lien upon the judgment recovered, and provides how it shall be created, we are not perplexed by the conflict of authority as to the right to hold a lien, but are to follow the cases which recognize the right to a lien and determine the rights of the lienors against contesting claimants. It is held by the English courts, which concede the right to a lien, that the claim of the attorney is paramount to that of one holding a counter-claim against the client. *Mitchell v. Oldfield*, 4 T. R. 123; *Morland v. Lashley*, 2 H. Bl. 441; *Randle v. Fuller*, 6 T. R. 456; *Middleton v. Hill*, 1 M. & S. 240. It is generally agreed, both here and in England, that a solicitor has a lien for his costs upon a fund recovered by his aid, paramount to that of the persons interested in the fund or those claiming as their creditors. *Barker v. St. Quintin*, 12 M. & W. 441; *Vaughn v. Davies*, 2 H. Bl. 440; *Wylie v. Coze*, 15 How. 415; *Stratton v. Hussey*, 62 Me. 286; *Andrews v. Morse*, 12 Conn. 444. The reason for this rule is that the services of the solicitor have, in a certain sense, created the fund, and he ought in good conscience to be protected.

The right, as against an attorney, to set off one judgment against another is said by some of the cases to be confined to such a set-off as would constitute a defense to the action wherein the judgment was recovered, and this rule would defeat the appellants, for it is quite clear that they could not have set off their claims against the

action of Beard for the assault and battery committed upon him. *Carter v. Bennett*, 6 Fla. 213; *Calvert v. Coxe*, 1 Gill, 95.

There is still another reason why the appellees should prevail. The right to set off one judgment against another is purely equitable, and allowed only where good conscience requires it, and good conscience is far from requiring that an attorney's claim for services in securing the judgment should yield to the claim of those holding rights adverse to their clients, under assigned judgments. *Simpson v. Lamb*, 7 El. & Bl. 84. It is upon this general principle that those cases proceed, and among them our own, which hold that the judgment creditor cannot, by any thing he may do, defeat the attorney's lien. *De Figanieres v. Young*, 2 Robt. 670; *Martin v. Kanouse*, 17 How. Pr. 146; *Dunning v. Galloway*, 47 Ind. 182; *McCabe v. Britton*, 79 id. 224. In *Johnson v. Ballard*, 44 id. 270, the court said in speaking of our statute: "This statute was intended to secure to attorneys pay for their labor," and held that, although the attorney had notice of an intended set-off, the lien was superior. More directly the point is in case *Adam v. Lee*, 82 Ind. 587. It is held, in *Smith v. Lowden*, 1 Sandf. 696, *Gihon v. Fryatt*, 2 id. 638, and *Purchase v. Bellows*, 16 Abb. Pr. 105, that the costs of the attorney will prevail against a motion to set off judgments, and as the right to fees is by statute made a legal right, the same rule must apply as to them. It is so applied in the cases of *Ennis v. Curry*, 61 How. Pr. 1, and *Ennis v. Curry*, 22 Hun, 584, which are fully in point. The cases therein referred to, and which seem to hold otherwise, were not founded on a statute creating a legal lien and conferring a legal right, but were founded on a line of cases which held the attorney's right to be an equitable one, existing only in the discretion of the court, and therefore inferior to a legal right.

The answer of Jacob Beard presents very different questions from those we have discussed. He avers that the judgment in his favor was recovered for an assault and battery committed upon his person; that he is a resident householder, and entitled to an exemption of \$300; that the judgments assigned to the appellants were rendered upon contracts; that his interest in the judgment against the appellant was of less value than \$300; and that he has no other property. It is argued by his counsel that if the judgments against him are set off against his interest in the judgment in his favor, he will be deprived of the benefit of his exemption, and that this the law

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will not permit. It is held in *Temple v. Scott*, 3 Minn. 419, by a divided court, that the right of set-off will prevail in such a case as this; but the opinion assumes, what is almost universally denied, that the statute of exemption is to be strictly construed, and starting from this erroneous premise, it is not strange that a wrong conclusion was reached. Our court has, in consonance with the decided weight of authority, held that the statute is to be liberally construed. *Gregory v. Latchem*, 53 Ind. 449. A liberal construction of the statute would lead to a different result from that reached in *Temple v. Scott*, *supra*, and Judge THOMPSON has shown, by arguments which seem to us unanswerable, that the entire reasoning of the Minnesota court is unsound. Thompson Homestead and Exemp. 893. Two cases are cited by this author sustaining his view that the right of set-off does not exist (*Curlee v. Thomas*, 74 N. C. 51; *Wilson v. McElroy*, 32 Penn. St. 82), and to these may be added *Duff v. Wells*, 7 Heisk. 17. We have seen that the rule is, that the right to set off one judgment against another will not be allowed where it is against good conscience, and to us it seems clear that it would be against conscience to take from an impoverished debtor all means of supporting himself and his family. To permit the appellants to make good their claim would, according to the confessed averments of the answer, take from the debtor all he has, and this cannot be done, as the Supreme Court of Pennsylvania says, without resulting "in a palpable evasion of the humane provisions of the act of Assembly."

The answer of Olivia Beard brings before us questions altogether different from those we have considered and decided. It is alleged in her answer, that prior to the rendition of the judgment in Jacob Beard's favor, she had supplied him with money with which to conduct his action, and that in consideration of this he had agreed to assign to her whatever judgment he might recover, and did, pursuant to his agreement, assign the judgment rendered against the appellants as soon as it was recovered.

One of the questions presented is, whether a judgment obtained for a breach of contract can be set off against a judgment for damages resulting from the commission of a tort.

We regard it as plain upon principle, as well as authority, that there may be a set-off in such cases. The reason of the rule prohibiting the allowance of set-off in actions *ex delicto* does not apply to cases where all questions are settled by the judgment, and noth-

ing remains of the original act for investigation or decision. But the question is so well settled that discussions would be out of place. *Waterman Set-Off* (3d ed.), § 344; 2 Hill. Torts, 270.

The answer shows that the agreement to assign was made before the judgment was recovered, and of course, when no judgment was in existence. An agreement to assign a judgment to be recovered in an action for a personal tort, in consideration of the advancement of money for the sole purpose of waging the litigation, by one who has no interest in the party plaintiff or the subject-matter of the action, is champertous, and cannot confer any rights as against the judgment debtor having valid claims against the judgment plaintiff. It is quite certain that Olivia Beard could not have acquired by assignment any right of action for the tort committed on Jacob Beard, for such a right of action cannot be assigned.

The claim of Olivia Beard is not put upon the ground that the judgment was assigned to her before the appellants acquired their judgments, but solely upon the ground that the previous agreement by her gave her a prior right. But that agreement, as we have seen, was not a valid one, and upon an illegal agreement no rights can be grounded.

We need not inquire what the rule would be in the case of a wife assisting her husband to wage a litigation against one who had inflicted personal injuries upon her husband, for so far as the record before us shows, Olivia and Jacob Beard were not related.

An assignee of a judgment secures no greater rights than his assignor could transfer, and Olivia Beard therefore took the assignment of the judgment subject to the rights of the appellants existing at the time of the assignment, against her assignor. *Robeson v. Roberts*, 20 Ind. 155.

It is said by appellees' counsel that pleading was unnecessary, and that therefore the rulings upon them are immaterial. The practice in a proceeding to set off one judgment against another is not prescribed by any statute, nor is the right to order it done conferred upon the courts by any legislative enactment; but the courts possess the authority, as they do many other powers, in virtue of their general equitable authority over officers and suitors, and as one of the inherent judicial powers which are necessary to the existence of a court. *Freeman Judg.* (3d ed.), § 467 a. The method of procedure is generally by motion, although some of the

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cases declare that it should be by bill or complaint, and others that it may be either by motion or by complaint. In *Lammers v. Goodeman*, 69 Ind. 76, a proceeding by complaint was recognized as a proper one, and in *McAllister v. Willey*, 60 Ind. 195, it was held that where parties in the trial court resort to pleadings without objection, none can be made in this court. We can see no reason why parties may not, if they elect to do so, put the facts on record in the form of pleadings rather than in the shape of evidence, and thus secure the judgment of the court upon the matters of law arising out of the facts. Such a practice has the great advantage of making the records much less cumbersome, and of presenting the law questions much more distinctly and clearly than the practice which carries the entire evidence into the record.

The interests of the parties being separate, and the questions different, the case is one where it is proper to affirm as to some of the appellees and reverse as to others; and we therefore affirm the judgment as to all of the appellees except Olivia Beard. As to her the judgment must be and is reversed.

So ordered.

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(66 Ind. 196.)

Insurance — life — ownership.

S. insured his life for the benefit of his wife, and paid the premiums until her death, he and two children surviving. Afterward he assigned his interest to H., as security, and H. paid the premiums until S.'s death. *Held*, that on the wife's death one-third of the policy went to the husband, and two-thirds to the children, and that H. could take only the one-third, but that he was entitled to be reimbursed for the premiums he had paid, with interest.*

ACTION to determine title to insurance moneys. The opinion states the case.

W. Olds, M. Sickafosse and H. S. Biggs, for appellant.

J. S. Frazer and W. D. Frazer, for appellee.

* See *Glans v. Glockler*, ante, 94

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ZOLLARS, J. The record in this case presents in different forms the following material facts :

On the first day of February, 1867, in consideration of the payment of a premium of \$70.20 by David Snyder, and the same amount thereafter to be paid annually, the Connecticut Mutual Life Insurance Company executed and delivered to the said David Snyder a policy of insurance upon his life, in which it agreed to pay \$2,000 upon due proof of his death.

That portion of the policy which is material to the parties in this controversy is as follows : " And the said company do hereby promise and agree with the said assured, his heirs, executors, administrators and assigns, well and truly to pay, or cause to be paid, at the city of Hartford, the said sum insured to the said assured, his executors, administrators or assigns, within ninety days after due notice and proof of the death of the said David Snyder, for the benefit of and payable to Wilhelmina R. Snyder, wife of the said David Snyder, deducting therefrom all notes taken for premiums unpaid at that date. And it is hereby conditioned and agreed, that if at any time after three premiums have been paid on this policy, it shall be surrendered while yet in force, the company will issue a paid-up non-forfeiture policy therefor, for such an amount as the then present value of this policy would purchase, as a single premium."

The wife, Wilhelmina, died intestate in December, 1869, and left surviving her, her husband, David, and their two minor children.

On the 20th day of February, 1871, said David Snyder, being indebted to appellee, assigned the policy to him by indorsing upon it the following :

" COLUMBIA CITY, *February* 20, 1871.

" For value received, I herewith assign my interest to the within policy to Henry Heist.

DAVID SNYDER."

In the month of November, 1874, David Snyder died intestate. Up to the time of the assignment and delivery of the policy to appellee, said David Snyder paid the premiums as stipulated for in the policy. After the assignment, appellee paid the premiums, viz.: On the 24th day of January, 1872, \$48.70; on the 24th day of January, 1873, \$46.20; and on the 24th day of January, 1874, \$46.55.

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In 1875, after appellant had been appointed administrator of the estate of said Wilhelmina, the insurance company filed its complaint in the Whitley Circuit Court against the parties to this cause, asking that they be required to set up their respective claims to the policy and the money due thereon.

After appellee had filed his answer and cross complaint the insurance company, by agreement of the parties, and an order of the court, paid to the clerk \$1,909.73, being the amount due on the policy, less an unpaid premium note, and interest on the same, amounting in all to \$127.68. We are not informed by whom this note was executed.

After this, the venue was changed to the Kosciusko Circuit Court. In that court appellant filed his answer and cross complaint, to each paragraph of which, except the general denial, a demurrer by appellee was sustained, and appellant excepted. The cause was then submitted to the court, and after the finding of facts, and conclusions of law on the same, a judgment was rendered, giving to appellee the full amount of money so paid over by the insurance company, the same not exceeding the amount of the premiums paid by him with interest, and the amount due him from Snyder for which the policy was assigned. From this judgment appellant appeals.

Was the policy the personal property of the wife Wilhelmina in such a sense, that upon her death, it went to her heirs at law as a part of her estate, or was it upon her death the property of the husband, so that his assignment transferred the legal title to the same to appellee? This is the important question presented by the record, the determination of which, counsel agree, will be decisive of this controversy.

That the policy was personal property, under our statute (2 R. S. 1876, p. 314), we think there can be no question. In consideration of the payment of the annual premiums, it contained a definite and fixed promise to pay a definite and fixed amount of money, upon the happening of an event, which was uncertain in nothing except the time at which it might occur. Such a policy of insurance is a chose in action, governed by the same principles applicable to other agreements involving pecuniary obligations. *Bliss Life Insurance*, 2d ed., p. 540; *Hutson v. Merryfield*, 51 Ind. 24; s. c., 19 Am. Rep. 722.

The policy in this case, by its terms, was executed for the benefit

of the wife, and upon a fair construction, was payable to her, and not to the personal representatives of the husband. Upon its execution, the title vested in the wife, and not in the husband. By the procurement of the husband, the wife became the owner of the policy and entitled to collect the amount that might become due on the same upon the death of the husband. Had the wife procured the policy to be issued, and paid the premiums, no one could doubt as to the ownership of the policy, and the right to collect the money due thereon. We are unable to see, in this case, why there should be any difference in the ownership and title of the policy by reason of the application having been made and premiums paid by the husband. Had the policy been made payable to the husband, he doubtless might have given it to the wife, and by proper indorsements thereon, conveyed to her the legal title to the same. In such case it would have become her separate property, by gift from her husband; and so, too, he had the legal right, in the first instance, to make the application, pay the premiums, and have the policy made payable to the wife for her benefit, and thus vest in her the legal title and ownership of the policy, as her separate property. The title and ownership of the property being vested in the wife by gift from the husband, it was her separate property, to be disposed of under the statute, which provides that the personal property of the wife, acquired during coverture, by descent, devise, or gift, shall remain her own separate property, to the same extent and under the same rules as her real estate so remains, and on her death before the husband, shall be distributed in the same manner as her real estate descends and is apportioned under the same circumstances. 1 R. S. 1876, p. 412; R. S. 1881, § 2488.

Personal property thus acquired by the wife, upon her death, descends to her heirs at law, as does her real estate, except for the purpose of paying debts and costs of administration the title vests in the administrator, if one be appointed. In this case the policy of insurance, upon the death of the wife Wilhelmina, descended to her heirs at law; the undivided one-third to the husband, David Snyder, and the other two-thirds to the minor children, subject to the rights of the appellant, as the administrator of her estate, who, for the purpose of paying debts and costs of administration, has the right to collect the money due upon the policy, to the exclusion of all others. If there had been no need of administration, and no administrator had been appointed, the heirs at law of the wife

might have collected the money. Subject to this right of the administrator, the husband had the legal right to assign his interest in the policy, as he did, to the appellee. Upon such assignment appellee became the owner of, and entitled on distribution to, one-third of the amount due upon the policy, after the payment of debts and costs of administration.

We have carefully examined the cases cited by the learned counsel on either side, besides many others, and while there is some conflict the conclusions reached by us in this case are in accord with the decided weight of the authorities. In the case of *Hutson v. Merrifield*, 51 Ind. 24, the contest was between the administrator of the husband and the surviving wife. The wife had taken out a policy upon the life of the husband, payable to herself, or in case of her death, to her children. The premiums were paid by the wife. She died before the husband, and without children. The case was disposed of as though the policy had contained no clause in relation to children. After deciding that the policy was a chose in action, the court say: "If the policy is a chose in action, it is personal property which at the death of the party holding and owning it would vest in the heirs of such person, subject to the payment of debts. That the amount of the policy is not payable until the death of the life insured can make no difference."

In the case of *Pence v. Makepeace*, 65 Ind. 345, the question arose between the administrator of the assignee of a policy of life insurance, and the widow of the insured. The husband had procured a policy of insurance upon his life, payable to his wife, and paid the premiums. During the life-time of the husband the policy was assigned as collateral security, and the assignee, before the death of the husband, paid three annual premiums. After the death of the husband, and on the trial of the cause in relation to the money due on the policy, the wife denied that she joined with her husband in the assignment of the policy. The court below had instructed the jury that the policy, being payable to the wife, vested in her alone the absolute ownership of it, and that it could not be assigned or transferred to any one by her husband, or any other person, without her authority. This instruction was held by this court to express the law correctly. See, to the same effect, *Wilburn v. Wilburn*, 83 Ind. 55, and authorities cited.

In *Bliss on Life Insurance*, 2d ed., § 318, the author says:

“ We apprehend the general rule to be that a policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created. * * * The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor, if it is expressed to be for the benefit of some one else.”

In the case of *Keller v. Gaylor*, 40 Conn. 343, a husband had taken a policy upon the life of his wife, payable to himself, or in case of his death before the wife, to his children. He died before the wife, and without children. *Held*, that at his death he had a vested interest in the policy, and that by his will it went to the wife. See, also, *Chapin v. Fellows*, 36 Conn. 132; s. c., 4 Am. Rep. 49; *Crittenden v. Phoenix Mutual Life Ins. Co.*, 41 Mich. 442; *Connecticut Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305; *Rupert v. Union Mutual Ins. Co.*, 7 Robt. 155.

It is maintained by the learned counsel for appellee, that Snyder, having paid the premium, had the right, after the death of the wife, to omit the payment, and thus let the policy forfeit; and that to avoid this loss, he had the right to change the beneficiary, or constitute himself such, by the assignment. If the policy was personal property, and the title thereto was vested in the wife, we are unable to understand how the husband, by an act of his, without the consent of the beneficiary, could change the ownership.

The property, under the statute, passed at once upon the death of the wife to her heirs at law, and the husband had no more control over it than before her death. True, he could not have been compelled to pay the premiums, or provide for the payment, but having paid them by himself and his assignee, the policy did not lapse, and the title to and ownership of the same did not change.

In the same edition of Bliss above quoted from, section 337, the author says: “ Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation or title to the money. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do, but if he does so, the person originally designated in the policy will derive the benefit. The change of

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designation can only be made by the person originally designated, and therefore all of such persons must concur in the change. If the policy is for the benefit of a woman and her children, the children as well as the woman must concur."

In the case of *Chapin v. Fellows*, 36 Conn. 132, a policy was issued upon the life of the husband, payable to the wife; or in case of her death, to her children. The wife died before the husband. After her death the husband surrendered the policy and took another for the same amount, the same date, and the same premium, but payable to himself. He paid one year's premium, and died insolvent. In a contest between the children and the husband's creditors, it was held that the husband had no right without the consent of the children thus to surrender the old policy and take the new one, payable to himself; and that the children were entitled to the amount due on the latter policy.

In the case of *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193; s. c., 38 Am. Rep. 289, the husband had procured a policy of insurance upon his life, payable to his wife, or in case of her death, to his children. After the death of the wife, and a remarriage, he surrendered the original policy, and a new one was issued in its place as a substitute therefor, bearing the same date and containing the same terms and conditions, except a provision that it should inure to the sole use and separate benefit of the second wife. *Held*, that the husband had no right to thus change the policy without the consent of the children, and that they were entitled to the avails of the new policy as against the second wife. It is said by counsel that these decisions were made under peculiar statutes, and are therefore not authority in this State. It will be found upon examination that these statutes, where they exist, give to married women no greater rights in policies, or the avails of policies, upon the lives of their husbands, than they have under the laws of this State, except that in some of the States, no claim of fraud can be made by creditors if the annual premiums paid by the husband do not exceed certain amounts.

It is said further, that to deny to the husband who has paid the premiums the right to dispose of the policy to his own use, after the death of the wife, imposes upon him a hardship and wrong. A sufficient answer to this is, that if he wishes to retain to himself the control and ownership of the policy in such case, he may so provide in the policy. It was to avoid this so-called wrong, that

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the Wisconsin court has held that the person procuring the policy may dispose of it without the consent of his nominee. Such a view, we think, is not consistent with legal principles, is in conflict with former rulings of this court, and against the weight of the authorities in the other States.

The appellee, having in good faith paid the premiums since the assignment of the policy, is entitled to have the amount so paid, with interest at six per cent, refunded to him out of the money paid over by the insurance company.

It follows from the conclusion we have reached, that the court below was in error in rendering judgment for appellee, and in its rulings upon demurrers to pleadings. The judgment is therefore reversed, at the costs of appellee, with instructions to the court below to overrule appellee's demurrers to the first, second, fourth, fifth and sixth paragraphs of appellant's answer and cross complaint, to sustain the demurrer to appellee's answer and cross complaint, and to proceed in accordance with this opinion.

Judgment reversed.

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(86 Ind. 208.)

Criminal law — false pretenses — obtaining money for charity — evidence of other frauds.

An indictment charging that the defendant, with intent to defraud, by falsely and fraudulently pretending to be a member of a Masonic lodge in Ohio, that he was on his way to a funeral, and was out of money, and by exhibiting a forged receipt from the Ohio lodge for dues, obtained money from a lodge of Masons in Indiana, upon a promise to repay the same, is good on motion to quash.

Evidence that the defendant had by similar pretenses, at another time and place, defrauded another Masonic lodge, is inadmissible, because such evidence is never admissible except upon the issue of intent, and here intent is not in issue because the representations were peculiarly within the defendant's knowledge, and if false must have been fraudulently intended. (*See note, p. 299.*)

CONVICTION of false pretenses. The opinion states the case.

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A. M. Cunning, for appellant.

F. T. Hord, attorney-general, *J. D. Alexander*, prosecuting attorney, and *W. B. Hord*, for the State.

NIBLACK, J. This was a prosecution against George E. Strong for obtaining money under false pretenses. R. S. 1881, § 2204.

The indictment was in four counts. Motions to quash each count were severally overruled. A jury found the defendant guilty as charged in the first count of the indictment; that he should be fined in the sum of \$10, and be imprisoned in the State's prison for the term of four years. A motion for a new trial being first overruled, judgment was rendered upon the verdict.

The first count of the indictment charged that the defendants, on the 27th day of September, 1881, for the purpose of defrauding Martinsville Lodge No. 74, of Free and Accepted Masons, feloniously, falsely and designedly represented to Jefferson K. Scott, the worshipful master, and Enoch M. Woody, the treasurer of said lodge, at the county of Morgan, in this State, that he, the defendant, was a member of Mercer Lodge No. 121, of the same order, located at Saint Marys, in the State of Ohio, and as an evidence that he was a member of said last-named lodge, then and there exhibited to the said Scott and Woody a receipt partly in print and partly in writing, as follows :

“HALL OF MERCER LODGE No. 121, F. & A. M., }
ST. MARYS, O., —, 1879. }

Received of Bro. George E. Strong for dues from —, to —,
1879, \$7.50.

C. H. PHELPS,

Secretary.”

[L. S.]

That the defendant further represented to the said Scott and Woody that his father-in-law had just died at the city of Vincennes, in this State, and that his, the defendant's, wife was then at Vincennes, awaiting his arrival at that place to assist her in taking the remains of his said father-in-law back to said town of St. Marys, in the State of Ohio, for interment; that he, the defendant, was then on his way from St. Marys to Vincennes to join his wife and to assist her as stated; that he was then without money or means to proceed further, and was greatly in need of the sum of \$3.85, to enable

him to reach Vincennes ; that his wife had with her sufficient money to pay all necessary expenses, and that if said Martinsville lodge would advance him that sum he would repay the same after reaching Vincennes ; that the said Scott believing said representations to be true and said receipt to be genuine, and relying upon the truth of such representations and the genuineness of such receipt, and being deceived thereby, and having the requisite authority to grant the relief solicited by the defendant, by the use of funds belonging to said Martinsville lodge, issued an order upon the said Woody, as the treasurer of said lodge, in the following form :

“ MARTINSVILLE, IND., *Sept.* 27, 1881.

E. M. Woody, Treas. Martinsville Lodge No. 74, F. & A. Masons : You will please pay to the bearer, a travelling brother in distress, \$3.85.

JEFF. K. SCOTT, *W. M.*”

And delivered the same to the defendant, for whose use and benefit it was intended ; that the defendant thereupon presented said order to the said Woody, who accepted it and paid the amount named therein to the defendant for and on behalf of said Martinsville lodge ; that the defendant was not then a member of said Mercer Lodge No. 121, nor of any other Masonic lodge ; that said paper purporting to be a receipt for dues to that lodge, and exhibited to the said Scott and Woody, was a false, forged and fraudulent writing ; and all the other representations made by the defendant for the purpose of obtaining said money were untrue, and that the defendant well knew that all the representations herein above set forth, as made to the said Scott and Woody, were untrue when he made them.

It is first contended on behalf of the appellant, that the court below erred in overruling his motion to quash this count of the indictment :

First. Because it is not made sufficiently to appear that Scott and Woody relied on his statements as to the existing facts as reasons for letting him have the money he obtained from them, but that the fair inference is, that they relied on his promise to repay the money, which was not a fraudulent representation within the meaning of the statute.

* Secondly. Because it was apparent from the facts averred that

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the money was given to the appellant as a charity merely, and hence in a way that made the representations upon which it was obtained immaterial.

In cases of this kind the false representations must be as to some existing fact, and not as to some promise for the future. 2 Bish. Crim. Law, § 420; *Keller v. State*, 51 Ind. 111; *Bonnell v. State*, 64 id. 498; *Perkins v. State*, 67 id. 270; s. c., 33 Am. Rep. 89. The representations must also be relied on. 2 Bish. Crim. Law, *supra*, § 462.

We think the count under consideration made it sufficiently obvious that the most material and most important representations made by the appellant were as to facts assumed to be then existing, and that the appellant's promise to repay the money was only incidentally made to give a favorable coloring to his representations as to his alleged membership in Mercer lodge, at St. Marys, in Ohio, and as to the genuineness of the receipt at the time exhibited by him; also, that these last-named representations were the ones mainly, if not entirely, relied on by Scott and Woody.

In the case of *People v. Clough*, 17 Wend. 351, it was held, in an ably written opinion, that an indictment would not lie for obtaining money by false pretenses where the money is parted with as a charitable donation, although the pretenses moving to the gift were false and fraudulent, but the statute under which that case was decided was less comprehensive than is ours on the subject of false pretenses, and the conclusion there reached, considered with reference to the statute of New York then in force, is not in accordance with the weight of authority, and does not in our estimation, afford a safe precedent even under a statute similar to the one under which that decision was made. A contrary doctrine has been held in England and in Massachusetts. Bish. Crim. Law, *supra*, § 467; *Commonwealth v. Whitcomb*, 107 Mass. 486; *Reg. v. Hensler*, 11 Cox C. C. 570; *Reg. v. Jones*, Temp. & M. 270.

The count before us is very long and very minute in the details of its averments. We have consequently only considered it in connection with the objections urged to it at the present hearing. Thus considered, the count appears to us to have been correctly held good upon the motion to quash it in the court below.

Questions are made upon the sufficiency of the other counts of the indictment, but as the appellant was convicted only upon the

first count, this appeal presents no question upon any of the other counts. *Short v. State*, 63 Ind. 376; *Bonnell v. State*, *supra*.

At the trial one Charles H. Phelps was introduced as a witness on the part of the State, and over the objection of the appellant, testified substantially as follows: "I live at St. Marys, Ohio, and belong to Mercer Lodge No. 121, of Free and Accepted Masons; I have seen the defendant before; I was secretary of our lodge during the entire years of 1879 and 1880; I am a physician, and had the blank receipt book and the seal of the lodge in my office. The defendant came to me with a note from Mr. S. Carr, who was then our worshipful master; the note said for me to try the defendant in the secret work of Masonry, and if I found him all right to pay him \$5, as a travelling brother in distress; I did try him and was satisfied that he was a Mason, and a very bright one; he told me his father-in-law had just died, and that he was on his way to the funeral; that he had run out of money, but that his wife had plenty of money to repay the amount and furnish all necessary expenses after he reached her, and that he would repay the amount I paid him (which was \$5), as a travelling brother in distress; this was on June 21, 1880, at St. Marys, in the State of Ohio; he stayed in my office quite a good while, and was there while I was out; I did not give him any blank receipt whatever, and did not sign my name to any paper, or give him or put the seal of the lodge on any paper for him; he never paid the \$5 back. * * * He then said he was a member of Federal Lodge No 1, Washington, D. C., and that he was in the government employ as a post-office detective."

The witness further testified that he had been for a long time a member of Mercer Lodge No. 121, above referred to by him, and that the appellant was not then and had never been a member of that lodge, and that he had never signed, nor authorized to be signed, his name to the receipt exhibited by the appellant to Scott and Woody; that a blank receipt was torn out of his receipt book some time between June 17, 1880, and the 10th day of the succeeding August, and that while the appellant was alone in his, witness' office, he had ample opportunity to fill up and put the seal of Mercer lodge upon one of the blank receipts in his, witness's, receipt book.

It is in the next place contended, on behalf of the appellant, that the court erred in permitting Phelps to testify as above to the fact

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that the appellant had likewise obtained money from him, and to the pretenses upon, and the circumstances under, which the money was obtained, and that for that reason a new trial ought to have been granted.

We find it difficult to deduce from the text-writers and decided cases any well-defined rule which will enable us to determine when proof of the perpetration of, or of the attempt to perpetrate, a similar offense is admissible as evidence of the intention with which the crime charged was committed.

The intention with which a particular act is done constitutes often the burden of the inquiry, and to prove the intent it becomes necessary, in many instances, to extend the examination beyond the particular transaction concerning which the accused is upon his trial. For the purpose therefore of proving the intent, not of proving the act itself, it is often permissible to show other criminal transactions of the same sort springing from the like mental condition. Bishop, in his work on Criminal Procedure, after giving various illustrations as to the proper application of this rule in criminal practice, sums up his conclusion in the following words :

"It is, that though the prisoner is not to be prejudiced in the eyes of the jury by the needless admission of testimony tending to prove another crime, yet whenever the evidence which tends to prove the other crime tends also to prove this one, not merely by showing the prisoner to be a bad man, but by showing the particular bad intent to have existed in his mind at the time when he did the act complained of, it is admissible; and it is also admissible, if it really tends thus, as in the facts of most cases it does not, to prove the act itself." 1 Bish. Crim. Proc., § 1067.

Wharton, in his treatise on Criminal Evidence, referring to the same subject, says : "In connection with the last exception are to be noticed cases in which, a party's intention being in issue, acts of a similar character are admissible. * * * * *

"It is essential however that such evidence, if admitted, should be simply to prove intent, and not to prove character, or establish a substantive and independent crime. Thus, in 1861, in Massachusetts, a new trial was granted in a case of embezzlement, where evidence of distinct acts of fraud was admitted, but where it did not appear that such evidence was limited by the judge, in his instructions to the jury, to the question of intent." Whart. Crim. Ev., § 46.

Roscoe's Criminal Evidence states the rule to be that there are cases in which evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of. This cannot be done merely with the view of inducing the jury to believe that because the prisoner has committed a crime on one occasion he is likely to have committed a similar offense on another, but only by way of anticipation of an obvious defense, such as that the prisoner did the act charged against him without any guilty knowledge.

That author continuing, at page 92, says: "There are three classes of offenses in which, from the nature of the offense itself, the necessity for this species of evidence is so frequently necessary that they will be considered separately; these are conspiracy, uttering forged instruments and counterfeit coin, and receiving stolen goods. In these the act itself which is the subject of inquiry is almost always of an equivocal kind, and from which *malus animus* cannot, as in crimes of violence, be presumed; and almost the only evidence which could be adduced to show the guilt of the prisoner would be his conduct on other occasions."

From these authorities, and others of like import which might be cited if deemed necessary, it appears to us to be fairly inferable that where the intent with which an alleged offense was committed is equivocal, and such intent becomes an issue at the trial, proof of the commission of other similar offenses, within certain reasonable limits, is admissible, as tending to throw light upon the intentions of the accused in doing the act complained of; but that where from the nature of the offense under inquiry, proof of its commission as charged carries with it the evident implication of a criminal intent, evidence of the perpetration, or attempted perpetration, of other like offenses will not be admitted.

In the case at bar the representations charged to have been made by the appellant to Scott and Woody were concerning matters peculiarly within the appellant's knowledge, and when proven to have been made, and to have been falsely made, as the evidence fully tended to prove, the inevitable inference was that such representations were made with a criminal intent and for a fraudulent purpose. The intent therefore with which the appellant made the representations charged against him was not an issue at the trial in the sense in which Wharton, *supra*, speaks of the intent as sometimes be-

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coming an issue. Consequently, the testimony of Phelps, tending to show that the appellant had at another place committed an offense similar to the one for which he was then on trial, was erroneously admitted, and a new trial ought, for that reason, to have been granted. *Corbin v. Flack*, 19 Ind. 459; *Todd v. State*, 31 id. 515; *Fletcher v. State*, 49 id. 124; s. c., 19 Am. Rep. 673.

The judgment is reversed and the cause remanded for a new trial. The clerk will give the necessary notice for a return of the prisoner to the custody of the sheriff of Morgan county.

Judgment reversed and cause remanded.

ELLIOTT, J., dissenting.

NOTE BY THE REPORTER.—The doctrine of the prevailing opinion in the principal case was likewise held in *Commonwealth v. Jackson*, 133 Mass. 17. The court said: "The next inquiry seems to present more serious difficulty. At the trial, the sale of John A. Parker, which was the subject of the indictment, having been made on May 10, 1880, the government was permitted to offer in evidence the circumstances and details of three other sales made respectively to George J. Hoyt on April 28, 1880, to Charles H. Parker on April 6, 1880, and to one Shepard Bowles on March 29, 1880. In all three instances the evidence tended to show that the parties had been induced to enter into negotiations with the defendant by means of advertisements in a Boston newspaper of the different horses which afterward became the subject of the sales. The representations and assertions made by the defendant, both by these advertisements and orally, as to these horses, were also put in evidence, and the parties to such sales were permitted to testify that the pretenses made by the defendant at each of these sales, as to both soundness and kindness of the horses and in other respects which were the subjects of them, were false. Evidence of these transactions was admitted, against the objection of the defendant, and 'solely for the purpose of showing the intent with which the defendant made the sale of the horse to Parker, as charged in the indictment.' In the instructions to the jury the evidence was limited to this purpose.

"It is not in general competent to show a distinct crime committed by the defendant for the purpose of proving that he is guilty of the crime charged. *Jordan v. Ormrod*, 109 Mass. 457. But as in all crimes, except a few statutory offenses, a criminal intent is necessary to be proved, evidence which legitimately bears upon this may be put in, even if it be derived from circumstances which also show the commission of another offense.

"The admission of evidence, in a trial for uttering counterfeit bills or base coin, of the utterance of similar bills or coin to other persons about the same time, is well established in England and America, and fully recognized in the courts of this State; *Commonwealth v. Stone*, 4 Metc. 43; *Commonwealth v. Bigelow*, 8 id. 235; although it is said by Chief Justice SHAW in *Commonwealth v. Stone*, *ubi supra*, to be an exception to the general rules of evidence. So far as the admission of such testimony 'may be deemed a departure from the technical rules of evidence,' it is said by Mr. Justice HUBBARD, in *Commonwealth v. Bigelow*, *ubi supra*, 'it is a departure justified by the peculiar nature of the crime of passing counterfeit money.' The criminal intent may frequently be inferred from the act done, but it is a matter of common experience that a base coin or counterfeit bill is often passed innocently. It is important therefore to show a guilty knowledge of their character on the part of the person uttering them, in order to lay the foundation of a just inference of crime against him. His knowledge of the thing uttered is shown by his familiarity with it, as shown by his use of it or similar instruments on former occasions. It is the knowledge which it may be inferred he must have derived from other transactions, and not the intent that the defendant had in other transactions, that renders the evidence admissible, as affording just ground for inference against him as to intent in the matter under examination.

"For the same purpose of showing guilty knowledge in a class of cognate cases, where

false plate or jewelry has been sold, evidence of other sales of similar ware is admissible. *Regina v. Francis*, L. R., 20 C. 128; *Regina v. Roebuck*, Dearsly & Bell, 24.

"Another exception to the general rule that independent crimes cannot be proved is found in that class of cases where acts are shown to have been done as part of the same plan or scheme of fraud. *Jordan v. Osgood*, *ubi supra*. Where an act is shown to have been done by a party intrusted with money, and the inquiry is whether it was an act of embezzlement, other acts in the conduct of the same business are admissible as showing his criminal intent. *Rex v. Ellis*, 6 B. & C. 145; *Commonwealth v. Tuckerman*, 10 Gray, 173; *Commonwealth v. Shepard*, 1 Allen, 575; *Regina v. Richardson*, 3 F. & F. 343.

"So where there is evidence of a conspiracy between the defendant and a deputy collector to defraud the revenue, by entering goods at an undervaluation, evidence of other transactions in the conduct of the criminal enterprise is admissible. *Bottomley v. United States*, 1 Story, 185. Where a conspiracy to defraud is alleged, other fraudulent purchases than those set out in the indictment, made about the same time and in pursuance of the conspiracy, are admissible for the purpose of showing the intent with which the goods were purchased. *Commonwealth v. Eastman*, 1 Cush. 189; *Rex v. Roberts*, 1 Camp. 389. In this class of cases the acts done are connected by unity of plan and motive, and therefore bear upon the purpose, the criminality of which is in question.

"Evidence has also been held admissible of other transactions, where previous attempts have been made unsuccessfully to commit the same crime. So where it is important to show a motive peculiar to himself on the part of a defendant which might have incited him to the commission of an act charged. *Commonwealth v. Bradford*, 126 Mass. 42; *Commonwealth v. Abbott*, 130 id. 473. The previous act here indicates a then existing purpose, which may be presumed to continue. Thus, where one was indicted for burning a building with intent to defraud an insurance company, previous attempts to burn the same building were permitted to be shown. *Commonwealth v. McCarty*, 119 Mass. 354; *Commonwealth v. Bradford*, *ubi supra*. Where it is important to show the relation of parties to each other, such evidence has also been admitted. Thus evidence of former familiarities is admissible to corroborate other evidence tending to show a commission of the act of adultery at a particular time. *Commonwealth v. Merriam*, 14 Pick. 518; 25 Am. Dec. 430; *State v. Wallace*, 9 N. H. 515; *Thayer v. Thayer*, 101 Mass. 111.

"The evidence here admitted as to the three other distinct fraudulent sales does not appear to come within any of the exceptions to the general rule that limits the trial to the immediate act for which the defendant is indicted. No instrument was used like the base coin or false plate, which might have been uttered innocently, and of which a guilty knowledge was important to be shown. The other statements made by the defendant at other times as to other animals might have been false, while these were not. The transactions formed no part of a single scheme or plan, any more than the various robberies of a thief. They were entered upon as from time to time he might succeed in entrapping credulous or unwary persons. Even if they were transactions of the same general character, they differed in all their details, and the defendant was compelled to defend himself against three distinct charges in addition to the one for which alone he was indicted. Evidence of the commission of other crimes by a defendant may deeply prejudice him with the jury, while it does not legally bear upon his case. It certainly would not be competent, in order to show the intent with which one entered a house or took an article of personal property, that he had committed a burglary or larceny at another time. *Regina v. Oddy*, 5 Cox C. C. 210; *Barton v. State*, 18 Ohio, 221. Where one was on trial for breaking and entering the City Hall of Charlestown, it was held that it was not competent for the government to prove that among the burglarious tools and implements found upon him there was the ward of a key made and fitted for entering the building of the Lancaster Bank, upon the ground that this evidence had relation to a distinct and independent transaction. *Commonwealth v. Wilson*, 2 Cush. 590.

"The case of *Commonwealth v. Turner*, 3 Metc. 19, does not sanction the admission of the evidence received in the present case. The defendant was there indicted for kidnapping a colored boy on the 12th of September, and evidence was held admissible of his conduct and declarations as to another boy on the day previous, as tending to show the intent with which he obtained possession of the boy whom he was indicted for kidnapping. The conduct and declarations of the prisoner thus immediately made before the crime of which he

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was accused showed his preparation therefor, although another than the boy originally intended became its victim.

"The objections to the admissions of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him. It is a well-settled rule of the criminal law, that the general character of a defendant cannot be shown to be bad, unless he shall first himself attempt to prove it otherwise. It ought not to be assailed indirectly by proof of misconduct in other transactions, even of a similar description. *State v. Lapage*, 57 N. H. 245; s. c., 24 Am. Rep. 60.

"It may well be doubted whether the exceptions to the general rule of law ought to be further extended. In *Regina v. Oddy*, *ubi supra*, Lord CAMPBELL remarks as to the reception of evidence of other occasions where base coin or counterfeit bills are charged to have been knowingly uttered, 'I have always thought that those decisions go a great way, and I am by no means inclined to apply them to the criminal law generally.'

"The question before us was considered in *Regina v. Holt*, 8 Cox C. C. 411. The prisoner was there charged with obtaining a specific sum of money from one Hirst by false pretenses. It appeared that he was employed by his master to take orders, but not to receive moneys, and indeed was forbidden so to do, and he was proved to have obtained the sum from Hirst by representing that he was authorized by his master to receive it. Evidence was then admitted of his having, within a week from the above obtaining, obtained another sum of money from another person by a similar false pretense, such obtaining not being in any way mentioned in the indictment. It was held, in the Court of Criminal Appeals, that such evidence was not admissible for the purpose of proving the intent of the prisoner when he committed the act charged in the indictment, and that the conviction must be quashed.

"Notwithstanding the careful limitation with which the evidence of the three other transactions by the defendant was received, we are of opinion that the learned judge erred in admitting it, and there must be a new trial."

ELLIOTT, J., in a dissenting opinion in the principal case, observed: "A recent writer says, 'So it seems that the guilty knowledge of the falsehood of a pretense may be shown by evidence of a previous obtaining or attempting to obtain by false pretenses.' Harris (Crim. Law, 369). The case of *Regina v. Francis*, L. R., 2 C. C. R. 128, is directly in point. That was a prosecution for attempting to obtain money by a false pretense, and the reporter's note thus shows the point reserved: 'Evidence was then offered, in order to prove guilty knowledge in Francis, that he had shortly before offered other false articles to other pawnbrokers. The learned judge admitted the evidence, but as the cases relied on by the prosecution were all cases either of forgery or uttering counterfeit coin, he reserved the question whether on such a charge as this such evidence was admissible for the purpose of proving guilty knowledge.' The evidence was held by a unanimous court, and upon full argument, to be competent, Lord COLERIDGE, C. J., saying: 'It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether at the time he did it he had guilty knowledge of the quality of his act or acted under mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake.' In the very recent case of *Turbar v. State*, 9 Cin. Law Bull. 24, the defendant was indicted for obtaining money by false pretense, and it was held by the Supreme Court of Ohio that it was proper to show a similar offense in Detroit, Michigan, the court saying: 'The decisions are uniform to the effect that where *scienter* is an element of the crime charged, previous offenses necessarily involving such guilty knowledge are admissible.' The court cited the cases of *Furrer v. State*, 9 Ohio St. 54; *Bainbridge v. State*, 20 Id. 264; *Shriedley v. State*, 28 Id. 130. Wharton says: 'Where the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of the crime with which the person is charged and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony

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of such acts, conduct or declarations of the accused, as tend to establish such knowledge or intent, is competent; notwithstanding they may constitute in law a distinct crime.' 1 Whart. Crim. Law, § 648. Professor Greenleaf lays down a like rule, and says: 'The like evidence of acts and declarations at other times, in proof of the character and intent of the principal fact charged, has been admitted in trials for arson, robbery, libel, malicious mischief, forgery, conspiracy, and other crimes.' 3 Greenl. Ev., § 15. In the case of *Regina v. Richardson*, 2 F. & F. 343, evidence of other acts of embezzlement than the one charged was held admissible, the court saying: 'I am clearly of opinion that this evidence is admissible. There is no principle of law which prevents that being put in evidence which might otherwise be so, merely because it discloses other indictable offenses.' Still stronger is the case of *Reg. v. Geering*, 18 L. J. Mag. Cas. 215, where in a prosecution for murder of a husband by a wife, evidence that other members of her family had died from poisoning in a manner similar to that of the husband, was held competent. Our own cases apply the general rule to prosecutions for uttering counterfeit money. *McCartney v. State*, 3 Ind. 353; *Berech v. State*, 13 id. 434. The first of these cases is directly in point as to the admissibility of the declarations made at the time of doing another act. The court, in stating the points made, said: 'Whether the court erred in permitting proof of what the defendant said at the time of passing each of said notes, in regard to it. There was no error in this. His declarations were a part of the *res gestæ*.' It is firmly settled that in civil cases, where notice or knowledge is an essential element of the issue, evidence of other acts is admissible although constituting distinct causes of action in favor of different persons. *Wooley v. Grand Street, etc., R. Co.*, 83 N. Y. 121; *Pittsburgh, etc., Ry. Co. v. Ruby*, 38 Ind. 294; s. c., 10 Am. Rep. 111; *City of Delphi v. Lowery*, 74 Ind. 590; s. c., 39 Am. Rep. 98. And as said by Lord COLERIDGE, 'The law of evidence is the same in criminal and civil suits.' *Regina v. Francis*, *supra*.

'The case before us is stronger than any I have cited, for the acts and conduct of the accused were connected with the fraudulent procurement of the form of the instrument afterward moulded into the false token which enabled him to perpetuate the crime charged against him.'

'I think the reason of the rule applies with peculiar force to a case, such as this, of an impostor who goes about the country imposing upon others by a systematic scheme, of which the particular act is but one of a long series of like criminal acts performed in the execution of a formed and continuous design to defraud communities.'

In *Mayer v. People*, 80 N. Y. 384, an indictment for obtaining goods on credit by means of false representations, it was held that the allegation of the fraudulent intent may be supported by proof of dealings of the prisoner with parties other than the complainant, such as purchases made upon the faith of similar representations, which tend to show a fraudulent scheme to obtain property by devices similar to those practiced upon him, provided the dealings are sufficiently connected in point of time and character, to authorize an inference that the purchase from the complainant was made in pursuance of the same general purpose. This was based upon *People v. Shulman*, 80 N. Y. 373, note, and the court remarked of that case: 'Although in that case there was a difference of opinion, that difference related to the details of the evidence admitted rather than the general principle involved.'

In *People v. Shulman*, the court said: 'Before a person can be convicted under our statute as to false pretenses (2 R. S. 677, § 53), it must be proved that he intended to cheat or defraud; that he made the false pretenses designedly to obtain property, and that he did obtain property by means of such pretenses, so made, and all evidence, legitimately tending to prove these matters, is competent upon the trial. The intent, motive, and knowledge of the prisoner are proper subjects of investigation, and they may be found by evidence of all the circumstances attending the criminal transaction, or by the declarations and conduct of the prisoner, both before and after.'

'In Wharton's American Criminal Law (6th ed.), § 649, it is said: 'Where the *scienter* or *quo animo* is requisite to and constitutes a necessary and essential part of the crime with which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute in law a distinct

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crime.' And 3 Greenl. on Ev., § 15, has the following: 'In the proof of intention it is not always necessary that the evidence should apply directly to the particular act with the commission of which the party is charged, for the unlawful intent in the particular case may well be inferred from a similar intent proved to have existed in other transactions done before or after that time.' And in Stephens' Digest of Evidence (May's ed.), p. 56, the rule is laid down as follows: 'When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue.' And at page 61 the same author says: 'When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant.' (See, also, 1 Greenl. on Ev., § 53 and notes.)

These citations from authors of acknowledged repute have abundant support in decided cases, and are sufficient to show the general rules of evidence which we are called upon to consider. They have been applied to a large variety of cases. In the trial of a person charged with passing counterfeit money, proof is always received to show that the prisoner on other occasions, both before and after the time named in the indictment, passed other counterfeit bills. On the trial of a person charged with receiving stolen goods, it may be shown that before and after the time of the alleged crime he received other stolen goods from the same party; and the same kind of evidence has been received upon trials for embezzlement. *Re v. Davis*, 6 Car. & P. 177; *Dunn's case*, 1 Moody C. C. 146; *Re v. Balls*, id. 470; *Re v. Richardson*, 8 Cox C. C. 448; *Com. v. Price*, 10 Gray, 478; *Com. v. Tuckerman*, id. 179; *Copperman v. People*, 56 N. Y. 591. And the same class of evidence has been received upon trials for obtaining property by false pretenses: *Re v. Francis*, 12 Cox C. C. 612; *Com. v. Stone*, 4 Metc. 43; *Com. v. Eastman*, 1 Cush. 180; *Com. v. Coe*, 115 Mass. 481; *Bielshofsky v. People*, 3 Hun. 40; *affd.*, 60 N. Y. 616; *Wyman v. People*, 4 Hun. 511; *affd.*, 62 N. Y. 693. In *Sime's case*, SEAW, Ch. J., speaking of this kind of evidence, said: 'This is an exception to the general rule of evidence. But it must be considered that it is to prove a fact not provable by direct evidence; that is, a guilty knowledge and purpose of mind, which can rarely be proved by admissions or declarations, and can in general be proved only by external acts and conduct. The case is strictly analogous to the rule in relation to the proof of scienter on a charge of passing counterfeit bills or coins.' In *Eastman's case*, DEWEY, J., said: 'Evidence of other purchases of goods than those charged in the indictment, made by the defendants from other persons during the month of March, 1844, under similar circumstances with the transactions charged in the indictment, was admissible for the purpose of showing the nature of the business of the defendants, and the extent of the purchases made by them, and also as bearing upon the *bona fide* character of the dealings of the defendants with the particular individuals alleged to be defrauded.' In *Wyman's case*, Judge DANIELS lays down the rule, as follows: 'Where goods have been obtained by means of fraudulent representations, it has been held that as the intent is a fact to be arrived at, it is competent to show that the party accused was engaged in other similar frauds about the same time; provided that the transactions are so connected as to time, and so similar in other relations, that the same motive may reasonably be imputed to them all.'

And the same rule of evidence has been applied in civil actions. In *Allison v. Matthew*, 3 Johns. 236, an action of trover, for goods fraudulently purchased of the plaintiff October 1, 1804, the plaintiff was permitted to show purchases of goods of two other persons, by similar representations, on the 5th day of November, 1804. In *Cary v. Hotelling*, 1 Hill, 311, the action was replevin to recover property claimed to have been obtained of the plaintiffs by the defendants by means of false representations as to their solvency and credit; and it was held that where the question is whether a vendee of goods procured the sale of them through fraud, distinct purchases made by him of others, under similar circumstances, at or about the same time, and when the like motive as the one imputed may reasonably be supposed to have operated, are admissible in evidence against him, with a view to the *quo animo*. In *Hall v. Naylor*, 18 N. Y. 588, there was a similar

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action, and Comstock, J., said: 'On the trial of such an issue, the *quo animo* of the transaction is the fact to be arrived at; and it is therefore competent to show that the party accused was engaged in other similar frauds at or about the same time. The transactions must be so connected in point of time, and so similar in their other relations, that the same motive may reasonably be imputed to them all.' In *McKenney v. Dingley*, 4 Greenl. 172, the action was replevin for a horse claimed by the plaintiff to have been purchased of him by one Reed by false pretenses, July 12, 1824, and claimed by the defendant to have been fairly purchased by him of Reed. It was held competent for the plaintiff to prove, as tending to prove a fraudulent intention, that Reed on the 9th and 10th, and on one or two other days in July, and also on the 19th day of August, had made similar false representations to other persons, from whom he had succeeded in obtaining goods to a large amount. See also *Thompson v. Rose*, 16 Conn. 71; 41 Am. Dec. 121; *Hove v. Dingley*, 17 Me. 341; *Howe v. Reed*, 12 Id. 515; *Rowley v. Bigelow*, 13 Pick. 307; 23 Am. Dec. 607; *Beal v. Thatcher*, 3 Esp. 194.

"As will be seen by an examination of the cases above cited, and by a consideration of the principles which underlie them, it can make no difference whether the transactions sought to be proved, to throw light upon the main issue, occurred before or after the time of the alleged crime. They may be more significant in the one case than in the other but in either case they reflect light upon the main transaction. Upon the trial of an indictment for passing counterfeit money, where the question to be determined is the guilty knowledge of the prisoner, it has some bearing upon that question that he continued to deal in the same kind of money; and the evidence of such dealing is of the same nature, and so far as I can perceive, of the same value, as evidence of prior dealing. So when a person is charged with procuring property by false pretenses, and the question is as to his knowledge, motive or intent, evidence that soon after, and from time to time afterward, he continued to obtain property from others in the same way and for the same fraudulent purpose, obviously reflects light upon that question. Such evidence has a direct tendency to show the mind with which he obtained the goods at the prior date.

"But it is said that the transactions proved here were too remote, and not sufficiently related to and connected with the principal transaction to be competent evidence. It is obviously impossible to lay down any general rule limiting the time within which such transactions must have taken place, in order to render proof of them competent. It is generally said in the cases that they must have occurred about the same time as the commission of the alleged crime; but that is quite indefinite, and in some of the reported cases proof of them has been received, although they occurred months before and after the time of the crime. Each case, as to the application of this rule, must depend largely upon its own circumstances, and not unfrequently the limit of them must rest entirely in the discretion of the judge presiding at the trial. For instance, upon the trial of an indictment for passing counterfeit money, upon the question of guilty knowledge, proof that for many months before and after the time of the alleged crime, the prisoner had been engaged daily, weekly or monthly in passing such money, would be competent. The longer the range of time the more conclusive would be the evidence; and yet in such case, the judge, in the exercise of his discretion, could restrain the investigation within reasonable limits. But there is one general rule which must apply to all such cases; there must be, in the transactions thus sought to be proved, some relation to or connection with the main transaction. That is, they must show a common motive or intent running through all the transactions, or they must be such as in their nature to show guilty knowledge at the time of the main transaction, and if they possess these characteristics, then it matters not whether they were before or after, or near to or remote from the main transaction."

In *Trogdon v. Commonwealth*, 81 Gratt. 862, the same doctrine was held. The court said: "The real question arising upon the three bills of exceptions is, whether evidence of other false pretenses is admissible upon this indictment. This question has been very ably argued by counsel on both sides, and is one of the very first impression in the State. It has created great difficulties in the minds of some of the judges. The subject has received a very careful consideration, and all the authorities referred to in the argument with many others not referred to, have been fully examined. After the most deliberate reflection, I think the hustings court did not err in receiving the evidence; and I will now proceed to give the reasons for this opinion.

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"I do not dispute the value of the rule which confines the evidence to the matter in issue; more especially in criminal prosecutions involving the life or liberty of the accused. It is of the utmost importance to him that the facts laid before the jury shall consist exclusively of the transactions which form the subject of the indictment, and which alone he can be expected to come prepared to answer. It is not just to him to require him to answer for two offenses when he is indicted for one, and thus to blacken his character and to create impressions on the mind of the jury unfavorable to his innocence. This is the doctrine of the courts in every well-regulated system of jurisprudence. And yet when we come to examine the cases bearing upon the question, it is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions. For example, in prosecutions for uttering forged notes, for passing counterfeit money, and for receiving stolen goods, evidence is always admissible of other transactions of a like character, although they may amount to distinct felonies, provided they are not too far removed. What are the limits as to time and circumstances, in such cases, it is for the court in its discretion to determine. Nor is it an objection, that the offenses thus proved are the subjects of separate indictments. *Roscoe Crim. Ev. 86; 3 Russ. Crimes, 285.* The object of this evidence is simply to show the guilty knowledge of the accused.

"There is another class of cases in which it is held permissible to prove other offenses for the purpose of showing the guilty intent of the accused. Thus upon an indictment for maliciously shooting at the prosecutor, it has been held proper to show that the accused had twice shot at the prosecutor the same day, for the purpose of rebutting the idea of accident, and of establishing the willful intent. *Reg. v. Voke, Russ. & Ry. 581.* And so, upon a prosecution for administering sulphuric acid to horses, with intent to kill them, evidence is admissible that the prisoner had frequently mixed sulphuric acid with horses' corn. *Reg. v. Mogg, 4 C. & P. 364.* Upon an indictment for a libel, the publication of other libels not laid in the indictment may be given in evidence to show the *quo animo* the defendant made the publication in question. *1 Greenl. Ev., § 53.* Indeed the cases upon this subject are almost innumerable, as may be seen upon examination of the books on criminal law. *3 Russ. on Crimes, §§ 285, 287, 288; Roscoe Crim. Ev. 86, 94.*

"In *Bottomley v. United States*, 1 Story, 135, Mr. Justice Story has very clearly stated the principle upon which this sort of evidence is received. He says: 'In all cases where the guilt of the party depends upon the intent, purpose or design with which an act is done, or upon his guilty knowledge, I understand it to be a general rule that collateral facts may be examined into in which he bore a part, for the purpose of establishing a guilty intent. In short, whenever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, their collateral parts, that is, other acts and declarations of a similar character tending to establish such intent or knowledge, are proper evidence. In many cases of fraud it would be otherwise impossible satisfactorily to establish the true nature and character of the act.' The remarks of Bieglow, J., in *Cook v. Moore*, 11 Cush. 212, 216, are to the same effect. Now, upon a prosecution for obtaining goods by false pretenses the indictment must aver the fraudulent intent, and the Commonwealth must prove it. It is the very gist of the offense. *Annable's case, 24 Gratt. 563, 570.* It is not sufficient that the accused knowingly states what is false. It must be shown his intent was to defraud. Such intent is not a presumption of law, but a matter of fact for the jury. Being a secret operation of the mind it can only be ascertained by the acts and representations of the party. A single act or representation in many cases would not be decisive, especially where the accused has sustained a previous good character. But when it is shown that he made similar representations about the same time to other persons, and by means of such representations obtained goods, all of which were false, the presumption is greatly strengthened that he intended to defraud.

"One of the counsel for the accused, in a very able argument upon this branch of the case, insisted that when the accused obtains goods by falsely representing himself a man of property, the jury must infer the guilty intent; and therefore evidence of collateral facts is unnecessary and irrelevant, and can only mislead the jury.

"It may be conceded that when goods are obtained by false representations of the kind mentioned — and this is the whole case — the jury may justly infer the fraudulent intent. But it frequently happens, in a large majority of cases, there are numerous facts and circumstances, sometimes of a minute and varied character, throwing light upon the conduct

and motives of the accused. It is impossible for the court to foresee what may be developed in the progress of the trial. When evidence is offered of other transactions to show the guilty intent of the accused, is the court to say the intent is already conclusively proved, and the evidence is therefore irrelevant? What would be thought of a judge who would thus prejudge the case and invade the province of the jury? The learned counsel would hardly concede the fraudulent intent of his client upon any state of facts. In the case before us we have but a small portion of the evidence. It is, of course, impossible for us to say what testimony was adduced by the accused upon the question of his particular intent; and yet we are asked to say that the evidence set out in the three bills of exception is irrelevant, upon the assumption that without it the jury must have found the guilty intent on the part of the accused. The opinion of this court in *Wahb's case*, 14 Gratt. 541, has a strong bearing upon this question. There the distinction is plainly drawn between guilty knowledge or intent as a presumption of law, and guilty knowledge or intent as a presumption of fact — a mere inference to be drawn by the jury. In the latter case, whilst the jury may find the accused guilty upon a given state of facts, they are not bound to do so. They are to weigh all the circumstances, and draw from them such conclusions as they may think warranted by the evidence. In this class of cases it has been held that even the admission of the accused that the act was done with a fraudulent or malicious intent cannot preclude the Commonwealth from proving it by any proper evidence. *Commonwealth v. McCarthy*, 119 Mass. 354; *Priest v. Inhab. Groton*, 108 id. 520.

But let us see what are the authorities on the question. In civil cases the decisions are abundant which hold that on the question of intent to defraud by false pretences other acts or representations of a like character done at or about the same time with that in issue are admissible with a view to the *quo animo*. The case of *McKenney v. Dingley*, 4 Greenl. 172, is an example. There the suit was to avoid a sale on the ground of the false and fraudulent conduct of the purchaser in representing himself to be a man of good property and credit when he was not; and it was held proper for the vendor to give evidence of similar false pretexts successfully used to other persons in the same town about the same time to show a general scheme to amass property by fraud. In *Hennequin v. Naylor*, 24 N. Y. 139, for the purpose of proving the fraud the vendor relied in part upon the fact that the defendant had purchased of several persons large bills of goods, the plaintiff, among the rest, just on the eve of suspension. See also *Whittier v. Varney*, 10 N. H. 291, 477; *Menfey v. Bruce*, 23 Barb. 561; *Allison v. Mattheu*, 3 Johns. 234; *Olmed v. Hotelling*, 1 Hill, 317; 1 Phillips Ev. 653, 773. These decisions are directly in point, and are entitled to great weight if the rules in criminal are the same as in civil cases. That they are so in general, so far as the means of ascertaining truth are concerned, is established by a great weight of authority. 1 Bish. Crim. Proc., § 508; 1 Greenl. Ev., § 65; Roscoe Crim. Ev. 1, and the cases cited by these authors. *Grayson's case*, 6 Gratt. 712.

As however it may be said that the rule confining the evidence to the point in issue should be more rigidly applied in criminal than in civil cases, let us examine some of the decisions based upon criminal prosecutions. The case of *Commonwealth v. Eastman*, 1 Cush. 189, was an indictment for obtaining goods or money under false pretences. It was ably argued and carefully considered. The court in commenting upon one branch of the case, say: 'Evidence of other purchases of goods than those charged in the indictment, made by the defendants from other persons during the month of March, 1844, under similar circumstances with the transaction charged in the indictment, was admitted for the purpose of showing the nature of the business of the defendants and the extent of the purchases made by them, and also as bearing upon the *bona fide* character of the dealings of the defendants with the particular individuals alleged to be defrauded. 'This species of evidence would not be admissible for the purpose of showing that the defendant had also committed other like offenses, but simply as an indication of the intention in making the purchases set out in the indictment. It is analogous to the proof of the *scienter* in indictments for passing counterfeit money, by showing that the defendant passed other counterfeit money to other persons about the same time. Such evidence is always open to the objection that it requires the defendant to explain other transactions than those charged in the indictment; but when offered for the limited purpose above stated, that of showing a criminal intent in the doing of the act charged, it has always been admissible.'

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"This decision was followed by the case of *Commonwealth v. Tuckerman*, 10 Gray, 173 — an indictment for embezzlement — and upon the trial evidence was admitted of other acts of embezzlement of different amounts and at different times, for the purpose of showing the fraudulent intent. The next case is that of *Commonwealth v. Jeffries*, 7 Allen, 548, for obtaining goods by false pretenses. In both cases the decision in *Eastman's* case was cited, commented upon and approved. And in all the cases the principle governing in prosecutions for having counterfeit money is applied to prosecutions for obtaining money by false pretenses.

"The counsel for the accused in this case have cited the case of *State v. Lapage*, 57 N. H. 245; and have read extracts from the opinion of Chief Justice Cushing. The learned judge discusses with great force and learning the rules governing the admission of collateral facts to show the intent of the accused. And although it is obvious he is not favorably inclined to the admission of such evidence, still he concedes there are cases in which it is admissible. After enumerating these cases, he proceeds as follows: 'In cases of indictment for obtaining goods under false pretenses it very often happens that the respondent has been in some kind of business of which buying and selling goods on credit makes a part, and in such case the difficulty is to draw the line between the points where legitimate business ceases and fraud begins. In such cases a single purchase of goods on credit might happen in the ordinary course of business; but if a party should make several purchases of goods at a time when he was in failing circumstances, that fact would have some tendency to show that he knew he was in failing circumstances, and that he did not intend to pay for them. Of course the effect of such testimony would depend upon the number and amount of such purchases, the after disposition of the goods purchased, and all the other circumstances.' See also *State v. Johnson*, 33 N. H. 441; *Hovey v. Grant*, 33 id. 509; *Defress v. State*, 3 Heisk. 53; s. c., 8 Am. Rep. 1; 43 Ala. 532.

"The case of *Wood v. United States*, 16 Peters, 342, is perhaps a more satisfactory authority than any cited. There, upon an information against the defendant for failing to invoice certain goods imported by him, with design to evade the duties and to defraud the government, it was decided that other invoices of articles imported into New York and assigned to the defendant was proper evidence to show the fraudulent intent. Judge Strong, in delivering the opinion of the court, said: 'The question was one of fraudulent intent or not, and upon questions of that sort, where the intent of the party is the matter in issue, it has always been deemed allowable as well in criminal as in civil cases to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate and establish his intention. Indeed, in no other way would it be practicable in many cases to establish such intent or motive; for the single act taken by itself may not be decisive either way, but when taken in connection with others of the like character and motive, the intent and motive may be demonstrated almost with absolute certainty.' These views the learned judge illustrates and enforces by argument, and by reference to authority.

"The most recent case on this subject is that of *Bielschowsky v. People*, decided by the Supreme Court of New York, and reported in 3 Hun, 46. It was a prosecution for obtaining goods upon false pretenses. It was decided to be competent to prove other offenses committed by the accused, with the view to show his intent in the particular offense charged, although it might incidentally prejudice the character of the accused in the mind of the jury. Upon a writ of error to the Court of Appeals of New York this judgment was affirmed. So that we have the decision of the highest courts of New York upon the very points involved here. Against this array of authorities we have the case of *Reg. v. Holt*, Bell Crim. Cases, 280, in which, upon an indictment for obtaining money upon false pretenses, it was held not permissible to show that the prisoner had obtained money by similar false pretenses within a week afterward, for the purpose of establishing the intent. As the case was not argued, and no reasons are given in the opinion of the court, it is impossible to say upon what grounds the decision was placed — possibly the subsequent pretenses were considered as too remote in point of time. The decision has not been approved by writers on criminal law. *Roscoe Crim. Ev.* 94. Opposed to this are the two cases of *Reg. v. Roebuck*, D. & B. 24, and *Queen v. Frances*, L. R., 2 Cr. Cas. Res. 128, decided in 1872. This last case is in entire harmony with the American decisions already cited; so that the English doctrine sustains fully the view taken by the courts in this country."

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It seems that the principal case is opposed to the weight of authority on this point.

As to procuring money in charity by false pretences, the court, in *Commonwealth v. Whitcomb*, 107 Mass. 486, said:

"But it is obvious that the case comes within the words of the statute. It comes also within the reason of the statute. There is as much reason for protecting persons who part with their money from motives of benevolence, as those who part with it from motives of self-interest. The law favors charity as well as trade, and should protect the one as well as the other from imposture by means of false pretences. Obtaining money by means of letters begging for charity on false pretences is held to be within the English statute (7 & 8 Geo. IV, ch. 29, § 53), which is quite similar to ours. *Regina v. Jones*, 1 Dea. 551; *Regina v. Hensler*, 11 Cox Crim. Cas. 570. A contrary doctrine has been held in New York. *People v. Clough*, 17 Wend. 351. The court admitted that the crime was of a dark moral grade, and was within the words of the statute of New York, which was copied from the English statute of 30 Geo. II, ch. 24. They adopted that construction chiefly on the ground that the preamble to the statute referred to trade and credit. But our statute, like the existing English statute, refers to no such matter, and is not restricted by any preamble." Wharton (Cr. L., § 1153) pronounces this a "sounder view" than that in *People v. Clough*, 17 Wend. 351; and Bishop (Cr. L., § 457), speaking of that case, says "the New York court took a doubtful step."

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(36 Ind. 327.)

Former adjudication — bar.

In an action against two surgeons for malpractice, an answer by one, that on a trial on the merits before a justice of the peace he had obtained judgment for his services in the matter in question, is a good defense; and a reply that the action for malpractice was pending when the other was commenced is bad. Otherwise if the suit before the justice was undefended.

ACTION for malpractice. The opinion states the case. The defendant had judgment below.

W. A. Cullen and *B. L. Smith*, for appellant.

J. W. Study, *G. B. Sleeth*, *J. W. Jordon* and *L. W. Flores*, for appellees.

BLACK, C. The appellant sued the appellees for malpractice as physicians and surgeons. The complaint alleged that on the 10th of January, 1880, the appellant's leg was broken; that the appellees were practicing physicians and surgeons in the neighborhood where the appellant resided, and as such were called upon and requested to exercise their professional knowledge and skill in adjusting and

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setting said broken bone, and cure and heal the same; that they undertook the same as such physicians and surgeons, for a reasonable fee, to be thereafter paid them; that without any fault on appellant's part, the appellees so negligently, unskillfully and unprofessionally treated and set said limb, that the same was and is six inches shorter than the other limb, and six inches shorter than it would have been if properly, skillfully and professionally treated and adjusted; that in consequence thereof, he has been rendered a cripple for life, and greatly injured in locomotion, and rendered less capable of maintaining himself and family, and has suffered damages in the sum of five thousand dollars, for which he demands judgment.

The appellees answered separately, each by a general denial and by paragraphs of special defense. Demurrers to all the special paragraphs were filed. The demurrer to the second paragraph of the appellee Dillon's answer, and those to the first and second paragraphs of the answer of the other appellee, Hobbs, were overruled. The demurrers to the other paragraphs were sustained.

The appellant replied to the paragraphs of answer which had been held sufficient on demurrer, and each of the appellees demurred to the reply to his answer. These demurrers were sustained. The appellant, having excepted to the rulings upon the demurrers to his replies, refused to reply further, whereupon judgment was rendered for the appellees. The assignment of errors presents for our consideration the rulings upon the demurrers to the second paragraph of Dillon's answer, the first and second paragraphs of the answer of Hobbs, and the replies.

In his second paragraphs of answer the appellee Dillon alleged, in substance, that he and his co-defendant, the latter to aid and assist, were, each separately for himself, employed by the appellant, each for a reasonable compensation, to be paid him severally by the appellant, and that this defendant's employment was not a joint employment with said Hobbs. The pleading then alleges at length, that on the 2d of October, 1880, before a certain justice of the peace, this defendant filed his complaint, setting forth therein that the appellant was then and there indebted to this defendant in the sum of sixty-five dollars; that this demand was made for and on account of "said services, care, skill and diligence by this defendant bestowed in and upon the adjusting, setting, treating and curing of said broken leg."

There are allegations showing the jurisdiction of the justice of

the peace, and it is averred that afterward, on the 6th of October, 1880, said cause came on to be tried before said justice, and the appellant appeared thereto, and for answer to the complaint, alleged, "that said services mentioned in said complaint, and for which judgment was therein asked for said sum of sixty-five dollars, by and in favor of this defendant and against said Goble, were entirely worthless and of no value whatever."

It is alleged that there was a trial, and the case was submitted to said justice upon the complaint and answer, and the evidence of the plaintiff and defendant being heard, said justice found for, and rendered judgment in favor of, the appellee Dillon, and against the appellant, for the sum of sixty-five dollars. It is further alleged that the judgment so recovered was and is for and in consideration of this defendant's services mentioned in appellant's complaint herein, and that said judgment still remains unappealed from, unsatisfied and in full force in favor of this defendant and against said Goble.

The first paragraph of the answer of the appellee Hobbs is like the second paragraph of Dillon's answer, transposing the names of Dillon and Hobbs, except that the action alleged therein to have been brought by Hobbs before the same justice, against the appellant, for services, is said to have been brought on the 19th of October, 1880. It is alleged that the amount claimed and recovered was thirty dollars, and that the trial and the rendition of judgment were on the 24th of November, 1880, and it is not alleged that the appellant appeared to the action, nor shown that he was defaulted, and there is no allegation of the issuing or the serving of summons, nor is it alleged that the judgment was duly given; but it is averred that the justice, when the complaint was filed, and at all times thereafter until he rendered, entered and signed said judgment, had full and complete power, authority and jurisdiction in and of said action and of the subject-matter thereof, and of the person of said Goble, to render, enter and sign said judgment.

By his second paragraph of answer, the appellee Hobbs set up the rendition of the judgment given in the action of the appellee Dillon against the appellant, before the justice, in much the same language that was used by Dillon in the second paragraph of his answer, above set forth, except that the character of the appellant's answer before the justice is not stated, the allegation concerning it being that Goble appeared and "pleaded to said action." And it

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is claimed in said second paragraph, that by suffering said judgment in favor of Dillon, and allowing it to remain unappealed from and in force, the appellant elected to settle with and release said Dillon from all actions and rights of action set forth in appellant's complaint against the appellees, and in fact released said Dillon from all actions and rights of action arising out of any supposed failure of the appellees, or either of them, to use proper and legal skill, care, attention and diligence in and about the setting and adjusting of appellant's broken leg, mentioned in the complaint, and in healing, curing and restoring said limb; and that the appellant is therefore barred and estopped to set up or prosecute his said claim and demand for damages against this defendant.

[Omitting minor points.]

By the second paragraph of Dillon's answer it was shown that in his action before the justice there was an answer of Goble that, amounted to a special denial of the value of Dillon's services, so pleaded as to avoid a negative pregnant. *Scovill v. Barney*, 4 Or. 288; *Lynd v. Pickel*, 7 Minn. 184. Besides this special denial, it must be considered that the general denial was also in. *Howard v. Kisling*, 15 Ind. 83. So it may be said in regard to the second paragraph of the answer of Hobbs, if Goble appeared before the justice and pleaded any plea, whatever its character, the general denial was in by virtue of the statute. *Howard v. Kisling*, *supra*.

If it be admitted that in the first paragraph of the answer of Hobbs the jurisdiction of the justice was properly or sufficiently shown, it is not alleged that there was any pleading for the defendant, or that he appeared; and we may consider that in the action of Hobbs for services the judgment was rendered upon default.

A final judgment of a court having jurisdiction, rendered upon the merits of the cause of action and still in force, when specially pleaded, concludes the parties to an issue thereby determined, and their privies, as to each other, from litigating the same cause of action in a collateral proceeding.

That there may thus be *res judicata*, the particular controversy sought to be concluded, the allegation which is the foundation of the second action, must have been involved in the former action so that it must or might have been tried and determined. If so involved, it will be presumed to have been determined. What was so involved in the former case must be determined from its pleadings. *Sharkey v. Evans*, 46 Ind. 472; *Bottorff v. Wise*, 53 id. 32;

Griffin v. Wallace, 66 id. 410. A final judgment settles and concludes every mere defense that was or might have been urged against the cause of action upon which it is based, whether there was an answer setting up a defense or the judgment was rendered upon default; but it is not conclusive as to a cross action, that is, an independent, affirmative cause of action in favor of the defendant against the plaintiff, unless that cross action was in fact involved in the issues of the former case, either as a set-off, a counter-claim or a defense. *Green v. Glynn*, 71 Ind. 336; Bigelow on Est. (2d ed.) 20, 101, 107.

In New York it has become an established doctrine that in an action to recover compensation for medical or surgical services rendered by the plaintiff, wherein judgment is given in his favor, the question of the care and skill of the physician or surgeon is necessarily adjudicated. In *Bellinger v. Craigie*, 31 Barb. 534, it was decided that such question had been adjudicated, where, in the action to recover for the services, there had been an issue made by an answer of general denial.

It was so held in *Gates v. Preston*, 41 N. Y. 113, where, in the action for the services, there had been judgment by confession; and it was there said that the same rule applied to a judgment by default, by which the right of action is by implication admitted. Again, it was so held in *Blair v. Bartlett*, 75 N. Y. 150; s. c., 31 Am. Rep. 455, where, in an action for the services, the defendant had appeared and put in an answer which he afterward withdrew.

These cases in the Court of Appeals proceed upon the theory that malpractice, which of course is hurtful, cannot be of any value, and that therefore a judgment giving compensation for the performance of the services is inconsistent with the existence of malpractice; that litigation provoked by either party necessarily involves the matter upon which both must rely, and hence if there be a judgment for the services, an action for negligence and unskillfulness cannot afterward be maintained if the former judgment be pleaded, and this, it would seem, without regard to the character of the issue in the action for the services, or whether or not there be any real issue — whether in that action the negligence and unskillfulness be specially pleaded, or there be a denial or an express confession of judgment, or a default. The party in whose favor the cause of action for malpractice exists is driven, at all events, to defeat the action for the services.

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It is said (*Dunham v. Bower*, 77 N. Y. 76; s. c., 33 Am. Rep. 570), that the principle of recoupment does not apply to these cases. Recoupment admits the right of the plaintiff to sue. The defendant proceeds upon the theory that the complaint sets forth a legal demand, which he seeks to cut off, in part or wholly, by his own claim. According to these authorities, the defendant in the action for the services cannot use his claim for damages as a counterclaim, but only as a defense; and if it be or be not used as a defense and there be a recovery against him, he cannot have his cross action. The former judgment being inconsistent with the idea of the existence of malpractice as a defense, it is thereupon held to be inconsistent with its existence as an affirmative cause of action. See *Schwinger v. Raymond*, 83 N. Y. 192; s. c., 38 Am. Rep. 415. These cases in the Court of Appeals, and cases announcing a contrary doctrine in other States and in England, are reviewed in Bigelow on Estoppel, pp. 99-108, and the New York cases are disapproved by that learned author. He says, on page 104: "If there is a separate and independent cause of action given to each party upon a breach of the contract by the other, neither can be compelled to allege his defense of a breach in a suit by the other. * * Every cause of action carries with it the right to put it into judgment; and that there is a separate and independent cause of action given to each party results necessarily from this fact, that either party may sue the other for a breach. No suit can be maintained except upon a legal ground of action. Now, as one cause of action cannot in itself alone, when merged in judgment, carry another and independent cause of action with it, it is difficult to understand how a judgment for the plaintiff without plea can extinguish a counter right of action by the defendant, however closely connected the two claims may be. Every one has the right to try his own case."

In *Sykes v. Bonner*, 1 Cin. Sup. Ct. 464, an action to recover damages of the defendant, a physician and surgeon, for "carelessly, negligently, and improperly" treating the plaintiff's arm, the defendant pleaded a judgment rendered upon default, in the court of a justice, against the present plaintiff and in favor of the present defendant, for his services in said treatment. A demurrer to this plea was sustained. The court said: "It was certainly not necessary, in order to entitle the plaintiff in that case" (before the justice) "to recover, that he should prove that he was not guilty of any negligence in his professional treatment. * * There were no

pleadings and no issues. There is nothing in the record to show that the question of negligence was involved." The court had the New York cases before it, and denied their doctrine.

Ressequie v. Byers, 52 Wis. 650; s. c., 38 Am. Rep. 775, is a case like the one last cited. It was held that a judgment in the court of a justice, upon default, in favor of a physician, for professional services, is not a bar to an action brought by the defendant therein against the plaintiff therein, for malpractice in respect to the same services. It is said, that "It was certainly not necessary, in order to entitle the plaintiff in the justice's court to a judgment, that he should prove that he was not guilty of any negligence. * * The issue in this action was not necessarily involved in a justice's suit." The right of the defendant in the action before the justice to recoup his damages is stated, and it is said, that "The plaintiff's claim for damages resulting from malpractice constitutes a separate and independent cause of action, which he can enforce without disturbing any matter litigated in that case."

Other cases inconsistent with the doctrine of the New York Court of Appeals may be found abstracted in Bigelow on Estoppel, and in the notes appended to the last-named case, in 38 Am. Rep. In this State, it has been decided, that in an action to recover compensation for professional services, negligence and unskillfulness in the performance thereof may constitute matter of counter-claim, which could not be but by recognizing the claim for the services as valid, except as it is overcome by the cross demand. *Reilly v. Cavanaugh*, 29 Ind. 435; *Nave v. Baird*, 12 id. 318.

The pendency of the appellant's action in the Circuit Court could not debar him from setting up the same demand as a counter-claim before the justice. *Willsie v. Northam*, 3 Bosw. 162; *Harris v. Hammond*, 18 How. Pr. 123.

If he had used his cause of action as a counter-claim, the amount of his recovery must have been within the jurisdiction of the justice. But it was optional with him whether he would so set up his grievance, or would sue upon it in another action brought by himself,—that is, continue the prosecution of his action already commenced. The right of the defendant to omit to set up a counter-claim, and afterward maintain an action against the plaintiff therefor, is recognized by the Code. 2 R. S. 1876, p. 64, § 60.

In the action before the justice, the appellant might make use of the malpractice as a defense. See *Howell v. Goodrich*, 69 Ill. 556.

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If he chose to set it up by any form of issue, and that issue was adjudicated against him, he cannot again litigate it.

If then there was an issue before the justice, under which the same evidence would have been admissible that would enable the appellant to recover in his action in the Circuit Court, it will be presumed, for the purposes of the demurrer, that the question of negligence and unskillfulness was adjudicated before the justice.

The statute in relation to justices of the peace provides (§ 34, 2 R. S. 1876, p. 612), that "All matter of defense, except the statute of limitations, set-off, and matter in abatement, may be given in evidence without plea." It is said in *Howard v. Kisling, supra*, that this statute in effect provides, like the statute of 1843, that "the defendant in a suit before a justice shall always have the benefit of the general issue, without pleading it;" and it is customary to say, having reference to this statute, as we have said above, that in actions before a justice the general denial is in by statute.

This statute excepts set-off as a matter of defense, which it is not. No reference is made in this statute to counter-claim, which is provided for in the Civil Code, where it is expressly distinguished from matter constituting a defense. § 60. It seems therefore that matter of counter-claim, as such, should be specially pleaded before a justice. To hold otherwise would be to deprive the defendant of his right to bring his own action upon his own cause, which is expressly saved to him by statute. See *Howard v. Kisling, supra*.

But it is not necessary perhaps to decide as to this; for unskillfulness and negligence of an attorney in conducting a case in court may be shown as a defense, under a denial, in an action brought by him to secure the value of his professional services in said case, for the purpose of proving that the services were not worth the sum charged and sued for, and as evidence tending to disprove the plaintiff's right to recover any thing, and as matter directly responsive to the allegations of the complaint. *Bridges v. Paige*, 13 Cal. 640. See *Terry v. Sickles*, id. 427.

So, in an action for the value of services of a mechanic, the defendant, under the general denial, may prove that the work was unskillfully done; as the general denial puts in issue the value of the work. *Raymond v. Richardson*, 4 E. D. Smith, 171. See *Schermhorn v. Van Allen*, 18 Barb. 28, and *Bellinger v. Craigie, supra*.

Therefore, under the general denial, which was in for better or

worse, the appellant might have defeated the claim of Dillon before the justice with the same evidence that would entitle him to recover in the Circuit Court.

A default admits the cause of action and all the material and traversable averments of the complaint. As to the amount sued for in such an action as that of Hobbs, which was upon a *quantum meruit*, a default admits that something is due the plaintiff from the defendant, but no more than a nominal amount. Upon an assessment of damages after a default, the defendant cannot, for the purpose of defeating a recovery, prove that the contract sued on was not performed, or any substantive defense as such, so as to secure a judgment for the defendant as to the cause of action. Evidence which under a general denial might defeat a recovery by the plaintiff, will not after a default have that effect. *Briggs v. Sneghan*, 45 Ind. 14, and authorities there cited.

If before the justice there was a default upon the defendant's failure to appear, it would not be necessary for the plaintiff Hobbs to disprove malpractice in order to recover for his services; and no evidence could be introduced by the defendant Goble for the purpose of disproving a cause of action, or a right to recover something for those services. He could not prevent a judgment for Hobbs upon the cause of action, and therefore an adjudication that the services were rendered, and that they were of some value. But such an adjudication could only determine the relative value of the services, and not their absolute value; for it would be made without an issue involving the question of malpractice as a cause of action or as a defense to an action. And while such a judgment upon default would be conclusive as to malpractice and every other matter as mere defense, yet the negligence and unskillfulness not having been involved, in fact, either by way of counter-claim or defense, the adjudication would not be conclusive as to a cross action for the malpractice.

The appellant had a right to control his own action. If it were otherwise, and he were required, before proceeding with his action, to defeat the suits before the justice, he might thus be driven to the trouble and expense of thrice establishing his cause of action; once for the purpose of defeating a claim of \$65, again for the purpose of defeating a claim of \$30, and again to recover in his own action, which, assuming his complaint to be true, involved great damage, and required the investigation and solution of perhaps in-

tricate and difficult questions. By doing nothing before the justice, he might control his own action; or he might confess judgment before the justice without thereby being precluded from pursuing his cross action. But if he should set up and litigate his cause of action as a counter-claim, he could not maintain the same claim in a collateral action, but would be required to content himself with a recovery within the jurisdiction of the justice; and if he became a party to an issue under which he might have urged the matter of his claim as a defense, it was necessary for him to succeed in defeating a recovery against him, or he must fail in his own action afterward; unless he might show that in fact the subject-matter of his actual defense did not embrace his cause of action, which is a question not before us in this case.

It has been convenient in the discussion of this subject, for the purpose of illustrating by authorities, to speak of malpractice as provable under the general denial. Having illustrated its dual character as matter of defense and matter of counter-claim, it may be proper to say that it is not necessary, under the section quoted from the statute concerning justices, to refer the right to prove negligence and unskillfulness by way of defense to a supposition that an answer of denial is in, though not pleaded. This defense being one not among those required by the statute to be specially pleaded, if the defendant appear and there be a trial, and judgment be given against him on the merits, as in case of Dillon, it will be presumed, in a collateral proceeding between the same parties, that such matter was litigated as a defense, because it was provable whatever the character of the answer, or without any answer.

In New York, *res judicata*, as to the negligence and unskillfulness, is made to depend upon the former judicial determination of the question of the value of the services, in the absence of any necessary consideration of the injury to the defendant, which, if considered, but not otherwise, would have led to a determination that the services were valueless. Such an estoppel may well be characterized as odious. One is struck with the frequency with which, in the reported cases, the suits for the services have been brought after the commencement of the actions for malpractice, as if for the purpose, which is sometimes declared, of preparing a defense for those actions. We have spoken of the hardships which may be imposed upon the plaintiff in action for malpractice, if he be required at all events to defeat the claims for professional ser-

vices. We are unwilling to extend the estoppel beyond the requirement of established principles.

In the second paragraph of Dillon's answer and the first paragraph of the answer of Hobbs and in the briefs of counsel for the appellees, much stress is placed upon the alleged fact that the employment of the appellees was not a joint employment. It is claimed that the appellant's complaint was upon a joint contract, and that as the second paragraph of Dillon's answer and the first of the answer of Hobbs allege that the appellees undertook and promised severally, and not jointly, and that the appellant promised them severally, and not jointly, to pay each of them what his services might reasonably be worth, therefore each of these paragraphs presented a bar to the action; and further, that the judgments pleaded by the three paragraphs under discussion settle conclusively that the appellees were not joint contractors, and that the appellant is therefore estopped from insisting to the contrary.

The appellant was entitled to sue for his injury either as upon contract, or in tort, as for a breach of duty imposed by law upon the physician, whether on hire or not. Though his pleading is not in good form, we think that upon a reasonable construction of the language employed, according to its ordinary meaning, the complaint was in tort. No promise of the appellee is alleged. The word "undertook," taken with the context, may perhaps be said to be used in the sense of entered upon, and not in the sense of promised, engaged or become bound.

It is not alleged by whom the appellees were called upon and requested, or by whom they were to be paid a reasonable compensation, and if the allegation that "they undertook the same," etc., can be said to be an averment of a promise, it is not stated to whom the promise was made. It was not necessary to allege that it became or was the duty of the appellees to act with due and proper skill, etc. 1 Chit. Pl. (16th Am. ed.) 399; 2 id. 607; *Scudder v. Crossan*, 43 Ind. 343; *Staley v. Jameson*, 46 id. 159; s. c., 15 Am. Rep. 285, and authorities cited.

An averment tantamount to the allegation of an express promise was absolutely necessary in a declaration in assumpsit. 1 Chit. Pl. (16th Am. ed.) 309; *Candler v. Rossiter*, 10 Wend. 487. Under our system of pleading, if from the facts alleged in the complaint a promise would be implied by law, it need not be alleged. *Gwallney v. Cannon*, 31 Ind. 227; *Wills v. Wills*, 34 id. 106. But where, as

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in this case, the plaintiff may declare upon his facts either in contract or in tort, it should not be assumed that the action is *ex contractu*, unless the complaint set forth a promise, for it is by the promise, instead of the entering upon the retainer or employment, that in such a case as this the action on the contract is distinguished from the action in tort.

It is therefore unnecessary to examine as to the sufficiency of these paragraphs as answers to an action *ex contractu*. If the complaint is in tort, there may be a recovery thereunder against both defendants for their joint tort, though their employment was several, and there may be a recovery against one defendant for his own tort, whether there also be a recovery against the other or not. In such an action, a former judgment in favor of one of the defendants, in an action for the same tort, is not a bar in favor of the other defendant. *Lansing v. Montgomery*, 2 Johns. 382.

It is not always essential, as counsel for appellant claim, that in order to bar an action by a former judgment, all the parties in both actions must be the same. If the appellant's cause of action was litigated in an issue made and adjudicated between him and one of the appellees, that appellee may plead the former adjudication, though the other appellee was not a party to that issue, and is unable to use the same adjudication as a defense. See *Richardson v. Jones*, 58 Ind. 240; *Davenport v. Barnett*, 51 id. 329.

Upon what has been said, we hold that the second paragraph of Dillon's answer was sufficient, and that the first and second paragraphs of the answer of Hobbs were bad.

We must therefore examine the reply to the second paragraph of the answer of Dillon, which alleges, in substance, that this action was pending in the Rush Circuit Court, and the appellee Dillon had been duly notified of the pendency thereof by the service of the necessary process, and had been summoned to appear and answer, before the suit mentioned in the said second paragraph of Dillon's answer herein was commenced, tried or adjudicated as shown in said answer.

The reply to the first and second paragraphs of the answer of Hobbs was like that to the second paragraph of Dillon's answer, except that it was alleged in addition that Hobbs had appeared to this action before the commencement of his suit before the justice. The reply to Dillon's answer was bad, and that to the answers of Hobbs would have been an insufficient reply to a good answer.

If the appellees had independent causes of action for their professional services against the appellant, and their claims were due, they had the right to have them adjudicated in any court of competent jurisdiction. To sue upon them, they must have done so in another action than that brought by the appellant, who cannot, in this action, on the ground of the prior pendency thereof, deny the right of the appellees to bring their actions before the justice.

In *Gates v. Preston*, *supra*, it is said: "Conceding that the effect of defeating the plaintiff's action" (for malpractice) "would have established the defendant's right to recover for his services, it could not have fixed their value, and there was no rule of law that required him to await the result of that action, before he could take proceedings to recover such value."

The judgment should be affirmed as to the appellee Dillon and reversed as to the appellee Hobbs.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment as to the appellee Dillon be affirmed, at appellant's costs, and that the judgment as to the appellee Hobbs be reversed, at his costs.

Petition for a rehearing overruled.

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(86 Ind. 368.)

Will—construction—child in ventre sa mere.

A testator in 1849 devised real estate to his daughter "A. and her children." A. then had a child, which died in December, 1850. She had another, born November 20, 1851, which died when three days old. Subsequently she had other children. The testator started on a journey in January, 1850. In November, 1851, on information of his death, the will was admitted to probate, but the date of his death was never ascertained. *Held*, that it might be inferred that he died while the second child was in *ventre sa mere*, and that A. and that child took as tenants in common, to the exclusion of the subsequently born children, and that on the death of the second child its share passed to the parents.

ACTION to settle claims to real estate. The opinion states the case. The defendant had judgment below.

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A. Major and S. Major, for appellants.

B. F. Love and H. C. Morrison, for appellee.

MORRIS, C. The appellants, Sandford A. Biggs, Earnest F. Biggs, John V. Biggs, Nannie L. Biggs and Enoch H. Pitts, who were the plaintiffs below, allege in their complaint that Henry Stuck, of Boone county, Kentucky, contemplating a trip to California, on the 10th day of December, 1849, made his last will and testament, devising to two of his daughters and his wife his real estate in Kentucky, in fee-simple, and devising his real estate in Shelby county, Indiana, to his daughter Angeline Biggs and her children; a part of which is in controversy in this suit. The testator left Boone county, Kentucky, for California, in January, 1850, and has not since been heard from; that at the time the will was made, Mrs. Biggs had a child living, born November 10, 1849; she had another child born November 20, 1851, which died November 23, 1851. The will, upon information of the testator's death, was probated in Boone county, Kentucky, on the 15th of November, 1851; that afterward, on the 23d day of April, 1881, the plaintiffs applied to the Shelby Circuit Court, by petition in writing, and filed therewith a duly certified copy of said will and the probate thereof, asking said court to receive the same and to order the clerk of said court to file and record the same in the record of wills, as required by law; that said will and the probate thereof were received by said court, and the clerk of said court was duly ordered to file and record the same as aforesaid, which was done; that at the time of the making of said will, the said Angeline Biggs was the wife of Perry D. Biggs, then of Boone county, Kentucky; that she had by him the following named children, to-wit: Earnest L. Biggs, born November 10, 1849, who died December 4, 1850; Cora Adelaide Biggs, born November 20, 1851, died November 23, 1851; a son, born in November, 1852, who died the same day; Harriet A. Biggs, born May 14, 1856; Charles H. Biggs, born November 9, 1858, who died July 31, 1873; Earnest F. Biggs, born August 13, 1861; John V. Biggs, born September 12, 1863, and Nannie L. Biggs, born March 10, 1868; that the said Harriet A. Biggs intermarried with Enoch H. Pitts, September 30, 1869, and died intestate in 1880, leaving no child or descendant of a child her surviving, but leaving her husband, Enoch H. Pitts, and the plaintiffs sur-

viving her; that the said Angeline Biggs, the mother of the plaintiffs, died intestate in July, 1877, at the county of Randolph, in the State of Missouri, leaving the plaintiffs and the said Harriet A. Pitts, her only children, her surviving.

It is then alleged that on the 21st day of December, 1858, the said Angeline Biggs and Perry D. Biggs, her husband, sold and conveyed to Shelley Stafford the land in controversy, which is part of the land devised by said testator to the said Angeline Biggs; that the same had been by the grantees of said Stafford conveyed to the defendant, who claims to be the owner of the same. It is also alleged that the said Angeline Biggs, under said will, took but a life estate in the lands devised to her and to her children, or that she and her said children held said land as tenants in common in fee-simple; that said will of said Stuck has not been probated in any court in said county of Shelby, nor was there any certified copy of said will, and the probate thereof, recorded in the record of wills in said county of Shelby, until the same was recorded under the order of said Shelby Circuit Court, as above stated; that the appellee has been in possession of said land since 1870, receiving the rents and profits of the same, which are of the value of \$3,000. The plaintiffs pray that the court will settle and determine the rights of the plaintiffs and defendant in and to said lands, taking an account of the profits thereof, and order partition, etc. A copy of the will was filed with, and is made a part of, said complaint, as is also the petition of the appellants, filed in Shelby Circuit Court, and the proceedings of said court thereon.

The appellee demurred to the complaint for the want of sufficient facts. The court sustained the demurrer, and the appellants electing to stand by their complaint, final judgment was rendered for the appellee. The sustaining of the demurrer to the complaint is the only error assigned.

[Omitting a minor consideration.]

The appellants insist—

First. That Angeline Biggs took a life estate in the land devised to her and her children, and that, upon her death, her children then alive took, by way of executory devise, the remainder in fee as tenants in common, whether born before or after the testators' death, and whether he died after the death of the first child, who died December 4, 1850, and before the quickening of the second, born November 20, 1851, or died during the existence of the first or second child; or,

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Second. If the testator died while the child that was alive when the will was made existed, or if he died while the child born November 20, 1851, was *in ventre sa mere*, then Mrs. Biggs and her children alive at testator's death took as tenants in common the land fee, which opened up from time to time, to let in after-born children.

In support of the first proposition, the appellants cite the following cases and authorities: *Carr v. Estill*, 16 B. Monr. 309; *Goss v. Eberhart*, 29 Ga. 545; *Sisson v. Seabury*, 1 Sum. 235; 1 Hill. Real Prop. 630, note; 4 Kent Com. 221, note to 225; *Webb v. Holmes*, 3 B. Monr. 404; *Hatfield v. Sohler*, 114 Mass. 48; *Hannan v. Osborn*, 4 Paige, 336; *Borden v. Kingsbury*, 2 Root, 39; *Righter v. Forrester*, 1 Bush, 278; *Coursey v. Davis*, 46 Penn. St. 25; *Mitchell v. Long*, 80 id. 516; *Jennings v. Parker*, 24 Ga. 621; 1 Hill. Real Prop. 512, 519, 630, note.

In the first case cited from 16 B. Monroe, the devise was to "Mary Baker Didlake and her children." Mary B. Didlake had no child, and was an unmarried infant at the time the testator made his will and at the time he died. She afterward married a Mr. Carr, and had by him one child. She and her husband sold and conveyed the land in fee-simple to Estill. Her child afterward sued for the land and recovered it. The court, rejecting the resolution in the *Wild* case, held that Mary B. Didlake took a life-estate in the land devised, and that her child took the remainder in fee. The court concluded that as there was no child *in esse* at the time the devise was made who could take jointly with the mother, according to the literal import of the devise, the intent of the testator was to give to the mother a life estate. It was argued by the court, that as the testator must have regarded the children of his daughter as the objects of his bounty, and knowing at the time that his daughter then had no children, he must have intended to provide for such future children as she might have. Without questioning the correctness of the inference thus drawn by the court, it is obvious that no such inference could obtain in the case in hearing. For in this case, Mrs. Biggs had a child living at the time the devise was made, who could have taken jointly with her had it survived the testator. Besides, the construction adopted by the court in the *Didlake* case was not in accordance with the law of Indiana, where the resolution in the *Wild* case is held to be a part of the common law in force here.

In the case of *Sisson v. Seabury*, 1 Sumner, 235, the devise was

in these words: "I give and bequeath to my loving grandson, Philip Sisson, all my homestead farm and housing thereon standing, lying part in said Tiverton and part in the township of Dartmouth, in the Province of Massachusetts Bay, with all my other lands, and salt meadows, and sedge flats in said Dartmouth, to him, my said grandson Philip Sisson, and to his male children lawfully begotten of his body, and their heirs forever, to be equally divided amongst them and their heirs forever." The testator died in 1877, leaving his said grandson, then eleven years old, unmarried and without children. After the death of the testator, Philip took possession of the lands, and on the 29th of March, 1814, conveyed the same to Seabury. Philip died in 1817, and after his death one of his children brought this action to recover the lands from Seabury, claiming title under the will of Thomas Sisson, on the ground that said Philip took but a life estate therein. The question was whether the devise created an estate tail in Philip Sisson, or an estate for life only, with a contingent remainder in fee in his male children. From the last clause of the devise, to-wit: "And to his male children lawfully begotten of his body, and their heirs forever, to be equally divided amongst them and their heirs forever." Judge STORY held that Philip took a life estate with a contingent remainder in favor of his male children. It was argued that in this way alone could the lands be equally divided amongst the male children lawfully begotten of his body and their heirs forever. Judge STORY says: "The first part of the clause is, 'I give and bequeath unto my loving grandson, Philip Sisson, etc., and to his male children lawfully begotten of his body,' etc. If the will had stopped here, there could not have been a doubt, either upon principle or authority, that it was the intention of the testator to create an estate in tail male in the devisee. In the first place, the words import a devise *in presenti*, and as the devisee had no children at the time of the will, if we construe the words, 'his heirs male,' etc., as words of purchase and a *designatio personarum in presenti*, the devise becomes utterly void, from the want of proper objects *in esse* to take; so that the intention of the testator is defeated. * * * This is exactly in conformity to one of the resolutions in *Wild's* case, 6 Co. R. 17. Now, *Wild's* case has constantly been admitted to be good law, and relied on in many subsequent cases."

It was held in *Wild's* case that a devise to one and his children

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should carry an estate in joint tenancy, when the person named had children living at the date of the will ; but that when no such children existed, the term " children " should be construed as a word of limitation, and as equivalent to issue of his body, thus creating an estate-tail general as to real estate. It would seem therefore that according to the reasoning of Judge STORR in the case of *Sisson v. Seabury*, cited and relied upon by the appellants, and the resolution in the *Wild's* case, the case of *Carr v. Estill, supra*, was not well decided. We think neither of the cases supports the first proposition insisted upon by the appellants.

In the case of *Webb v. Holmes, supra*, a conveyance, made by Henry Crist and Rachel, his wife, to their daughter, Sarah Thomas, read thus : " This indenture, made and entered into this 25th day of July, 1812, between Henry Crist and Rachel his wife, of Bullitt county and Commonwealth of Kentucky, of the one part, and Francis and Sarah Thomas of the same place, of the other part, witnesseth, that for the love and good-will for them and their children, that intending to convey to Sarah Thomas a certain *dower* in lands, for the entire benefit of her and his children, do hereby, and by these presents, transfer, set over, and convey to her and her children forever, all that certain tract," etc., " containing," etc., " which said tract of land, with all and singular its appurtenances thereunto belonging, we do hereby transfer and convey to said Sarah Thomas and her children forever," etc. Sarah Thomas had four children alive at the date of the deed, and four were born after the making of the deed and before the death of her husband. The court held that Sarah took a life estate in the land conveyed, and that all her children took the remainder in fee. The court seem to lay some stress on the word " dower " as used in the conveyance. Unless the decision turned upon the use of the word " dower," the case is in direct conflict with that of *King v. Rea*, 56 Ind. 1, and cannot be regarded as authority in this State.

In the case of *Hatfield v. Sohler*, 114 Mass. 48, the testatrix, Mrs. Coleman, devised to her daughter, Mrs. Hatfield, to her sole and separate use, free from the interference of her husband or any other person, to have and to hold the same to her sole and separate use as aforesaid, and to her children or child, or the issue of any deceased child, in equal proportions. Mrs. Hatfield had two children at the date of the will, and afterward by a second husband had two other children. Of this devise the court say : " It is not to Mrs. Hat-

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field, her heirs and assigns, and contains no words extending her interest beyond her life. There are no terms used indicating an intention to give her the power of disposal during her life. The devise 'to the children or child of the said Louisa or the issue of any deceased child in equal proportions,' is inconsistent with an intention to give Mrs. Hatfield a fee or an estate in tail. These are words of purchase, and are of no effect if she took an estate of inheritance with the power of disposal. We think the intention of the testatrix was to give Mrs. Hatfield an estate for life, and the remainder to her children." The court held that the remainder opened to let in children born after the death of the testatrix.

This case differs from that before us in several respects. The devise gave the property to Mrs. Hatfield exclusively for the period for which she was entitled to hold it. Its terms did not create in her any thing more than a life estate. There was a clearly expressed purpose to give an estate to the child or children. They must take in remainder or not at all. The construction adopted was the only one by which the intention of the testator could be maintained. By section 5 of the act of 1843 (R. S. 1843, p. 485), which was in force at the time the will of Henry Stuck was made and at his death it is provided that "Every devise of lands shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall manifestly appear by the will that the devisor intended to convey a less estate." Had the appellants been in existence at the time of the testator's death, it would hardly be pretended that they and their mother would not have taken the land in controversy in fee as tenants in common; and in this it differs from the case just cited.

The case of *Hannan v. Osborn*, 4 Paige, 336, is also cited and relied upon by the appellants. The devise in the will of Alexander Hannan was as follows: "I give, devise and bequeath unto my sister Mary Ann Philips, wife of Thomas Philips, of the city of New York, all the remainder of my estate, both real and personal: To have and to hold the same to her and her children forever. But in case my said sister Mary Ann shall die, and all her children shall die, leaving no children, then my will is, that this part of my estate shall then be divided among my brother and sisters; to-wit, brother John, and sisters Julianna Stone and Amelia Manchester." It was expressly provided in New York at the time, by statute, that the intent of the party shall govern, as well in the construc-

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tion of deeds as of wills. And in view of this, the chancellor in this case says : "The rule, that the intention of the testator, so far as it can legally be carried into effect, should govern in all devises of real estate, has always been acted upon by courts of justice; except in two or three special cases, where technical rules of law have been permitted to defeat such intent. The Revised Statutes having abolished the rule in *Shelley's* case, which formed one of those exceptions, and having also restored the expressions, 'die without issue,' and 'die without leaving issue,' to their natural and obvious meaning, courts of justice are now left free to give such construction to the language of a testator in his will, as to carry into effect his intention." The court further says : "By the common law, a devise to a man and his children as an immediate gift to both was held to be a devise to the parent and children jointly, or to give an estate tail to the father, according to circumstances. If there were children in existence at the time, it was held that they took jointly with the parent; but if there were none, he took an estate tail by implication." The chancellor then further states, that if from the will it appeared that the intention of the testator was, that the children should take the estate only by way of remainder after the death of the parent, then the children who were in existence at the death of the testator, as well as after-born children, took the estate as purchasers, after the termination of the life estate of the parent. He also held that by the terms of the devise the intention of the testator was to give Mary Ann Philips a life estate only, and that her children took the remainder, which vested in those alive at the death of the testator, opening to let in after-born children.

We think this case cannot be held to support the propositions relied upon by the appellants, but that as contended by the appellee, it is opposed to them. This is a devise to Angeline Biggs and her children; it does not appear from the language of the devise that the testator intended that Angeline should have only a life estate, and that her children should take the estate by way of remainder in fee after her death. Therefore, in the language of Chancellor WALWORTH, if there was a child alive at the death of the testator, Angeline and such child by the common law took the estate jointly, or under our statute, as tenants in common.

We have carefully examined the other cases referred to by the appellants' counsel in their able and elaborate brief, but to discuss

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and examine them here would extend this opinion unduly. In view of the decisions of our own court, we do not think that the first proposition relied upon by the appellants is the law. *Siceleff v. Redman's Adm'r*, 26 Ind. 251; *McCray v. Lipp*, 35 id. 116; *Andrews v. Spurlin*, id. 262; *Gonzales v. Barton*, 45 id. 295; *King v. Rea*, 56 id. 1.

We admit that as contended by the appellants, the intention of the testator, as gathered from the whole will, should so far as it can consistently with the rules of law be enforced, and that it should guide courts in the construction of the will; but as will be seen by an examination of the cases referred to by the appellants, it is not always the presumed or actual intention of the testator, but as contra-distinguished therefrom, his legal intention, that must be enforced. The application of the rule in *Shelly's* case sometimes unquestionably defeats the intention and actual purposes of the testator; yet the rule has been so long adhered to in Indiana that it must be regarded as the law here until changed by the legislature.

The devise in this case is extremely simple. Its language is: "I give and bequeath to my daughter Angeline Biggs and her children all my real estate in the county of Shelby, and State of Indiana." Angeline had one child living at the time the will was made. She did not therefore, according to *Wild's* case, take an estate tail by implication.

It is alleged in the complaint that the testator's will was probated in Kentucky on the 15th day of November, 1851, upon information of the testator's death. It is also alleged that on the 20th day of November, 1851, five days after the will was probated, another child was born to Angeline, which died three days afterward; the first child died December 4, 1850, nearly a year before the second was born.

Upon these facts we think it fair to infer that the testator died after the quickening of the second child, and at a time when it was legally capable of taking the estate jointly, or as a tenant in common, with its mother Angeline; that consequently upon the testator's death, by the plain terms of the devise, the land in controversy vested in the devisee Angeline and the child with which she was then pregnant as tenants in common. *Hannan v. Osborn*, *supra*; *Shotts v. Poe*, 47 Md. 513; s. c., 28 Am. Rep. 485; *Viner v. Francis*, 2 Cox, 190; *Benson v. Wright*, 4 Md. Ch. Dec. 278.

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The appellants insist, that if this should be conceded, the estate so vested in Angeline and her child as that it opened to let in after-born children ; that the testator knowing at the time that he made the will that Angeline had then but one child, he used the word "children" to indicate his purpose to provide for all the children which she might have ; that the use of the word "children" is inconsistent with the intention on the part of the testator to limit his bounty to the mother and child then living, or to such children as might exist at the time of his death. But to this it may be replied that the word "children" is used in a general sense, applying as well to such child or to such children as might be living at his death, as to such and subsequently born children. We have not been able to find a case like this in which it has been held that the estate opened to let in after-born children.

It is said in 2 Jarman on Wills, 702, that "An immediate gift to children (*i. e.*, a gift to take effect in possession immediately on the testator's decease) * * * comprehends the children living at the testator's death (if any), and those only. Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution." He further says : "In cases falling within this rule, the children, if any, living at the death of the testator, take an immediately vested interest in their shares, subject to the diminution of those shares * * * as the number of objects is augmented by future births, during the life of the tenants for life."

It is obvious that the devise under consideration falls within the first, and not within the second proposition laid down by Jarman. It falls within the first, because the gift takes effect immediately upon the death of the testator. It does not fall within the second, because there is no particular estate carved out of the thing devised, nor is there any gift over to the children. In complete agreement with Jarman is the case of *Jones' Appeal from Probate*, 48 Conn. 60 ; *Hannan v. Osborn*, *supra*.

In the case of *Shotts v. Poe*, 47 Md. 513 ; s. c., 28 Am. Rep. 485, the testator, Lewis Shotts, by his will devised all his property to his son, John Lewis Shotts. Afterward the testator executed a declaration of trust, setting forth that in consideration of the natural

love and affection which he bore for the children of his said son, he did thereby appoint the said John Lewis Shotts trustee 'for the following property for their use, and until they arrive at the age of eighteen years: \$1,500 in Baltimore city stock, and one note of Christian Weisample for \$5,000, to take effect at my death; and when each child arrives at age, the said property to go to my son, John Lewis Shotts.' The testator died in 1857, and the will and declaration of trust were admitted to probate as testamentary papers. John Lewis Shotts had, at the date of the trust and at the death of the testator, only two children. He renounced the executorship of the will, and Poe was appointed administrator with the will annexed, who filed a bill in equity, suggesting doubts as to the construction of the will. After disposing of some preliminary questions, the court says: "The only other question is, whether the term 'children,' used in the declaration of trust, includes children of the son, John Lewis Shotts, that may be born after the death of the testator? And upon this question there can be no doubt whatever. If there be any question that may be regarded as incontrovertibly settled, in the construction of wills or testamentary papers, it is, that an immediate gift to children, *simpliciter*, without additional description, means a gift to the children in existence at the death of the testator; provided there be children then in existence to take. In *Powell on Devises*, vol. 2, p. 302, the rule, as deduced from all the cases, is stated thus: 'That an immediate gift to children (*i. e.* immediate in point of enjoyment), whether of a person living or dead; and whether it be to the children simply, or to all the children; and whether there be a gift over or not, comprehends the children living at the testator's death (if any), and those only; notwithstanding some of the early cases, which make the time of the making the will the period of ascertaining the objects.' To the same effect is the rule as stated by *Redfield on Wills*, pt. 2, p. 330; * * and the decided cases fully support the propositions thus laid down by the text-writers." See the many cases cited by the court.

We have examined with care the cases referred to by the appellants. We are aware that the case of *Coursey v. Davis*, 46 Penn. St. 25, seems to support the position of the appellants, but in so far as it does this it is opposed to our own decisions. So, too, the case in 3 B. Monr. is apparently in their favor, but as before shown, the case is opposed to the decisions of this court. So, too, the case of *Jackson v. Coggins*, 29 Ga. 403, seems to sustain the second propo-

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sition relied upon by the appellants ; while the case of *Goss v. Eberhart*, 29 Ga. 545, supports the first. But we think the clear weight of authority is the other way.

The following cases, among others, referred to by appellee's counsel, support the conclusions which we have reached : *Goodwin v. Goodwin*, 48 Ind. 584 ; *Glass v. Glass*, 71 id. 392 ; *Jenkins v. Freyer*, 4 Paige, 47 ; *Gross's Estate*, 10 Penn. St. 360 ; *Worcester v. Worcester*, 101 Mass. 128 ; *Campbell v. Rawdon*, 18 N. Y. 412 ; *Handbury v. Doolittle*, 38 Ill. 202 ; *Swinton v. Legare*, 2 McCord Ch. (S. C.) 404 ; *Nimmo v. Stewart*, 21 Ala. 682 ; *Lorillard v. Coster*, 5 Paige, 172 ; *King v. Rea*, 56 Ind. 1 ; 3 Washburn Real Prop. (3d ed.), side p. 685.

In *Handbury v. Doolittle*, *supra*, it was held that if no estate intervenes between the death of the testator and the vesting of the estate in children as a class, the estate goes to the children in being at the death of the testator.

In the case of *Nimmo v. Stewart*, *supra*, it was held that if a devise be to one and his children, and he has children at the date of the will and at the death of the testator, the parent and children living at the death of the testator take jointly under the will. To the same effect is the case of *Smith v. Ashurst*, 34 Ala. 208.

This case has been argued elaborately and with much ability on both sides. We have endeavored to consider the case with the care which its importance seemed to require, and have concluded :

First. That the devise cannot be construed as giving to Angeline Biggs a life estate in the land described in the complaint, and the remainder in fee to her children.

Second. That, upon the facts stated in the complaint, the fair inference is that the testator, Henry Stuck, died while the second child of Angeline Biggs was *in ventre sa mere*, and that upon the testator's death, Angeline and said second child took, under said will, as tenants in common, the land in dispute, but that the estate thus vested in them did not open to let in after-born children.

Third. That upon the death of said second child, its interest passed to its parents, and that their subsequent grantees took the whole title to said land ; that there is no error in the record, and that the judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be, and it hereby is, in all things affirmed, with costs.

TEAGARDEN V. McLAUGHLIN

(86 Ind. 478.)

Parent and child — parent's liability for child's act as contractor.

A minor son contracted with his father to clear a parcel of land, and in doing so negligently burned property of a third person. *Held*, that the father was liable.

ACTION of damages for negligence. The opinion states the case. The plaintiff had judgment below.

C. N. Pollard, for appellant.

J. F. Elliott and *L. J. Kirkpatrick*, for appellee.

ELLIOTT, J. Property belonging to the appellee was burned by fire, negligently and wrongfully set by the son of the appellant. The son had contracted with the father to clear the parcel of land on which the property was situated for a designated price, and in carrying out this contract, set out the fire which destroyed appellee's property. At the time the contract was made the son was not of full age, and was living with his father and treated as a member of his family. The appellant asked an instruction affirming that if the work of clearing the land had been let to the son as an independent contractor, and the injury resulted from his negligence, the appellee could not recover. The court refused to give this instruction, and this ruling presents the principal question in the case.

A son not of full age, who undertakes to do work for his father, cannot be regarded as an independent contractor in such a sense as to shield the father, who employs him to do work, from injuries resulting from his negligence. It would be pushing the rule absolving an employer from liability for the negligence of an independent contractor to an unwarrantable extent to extend it to the case of a father who contracts with his minor son. The reason, upon which rests the rule holding employers not liable for the negligence of independent contractors, fails where the contractor is the infant child of the employer. The reason supporting the rule is, that the employer has no control over the acts of the contractor

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in the performance of the work, and ought not to be held responsible for that over which he has no authority or power. The right to control is the test by which to determine whether the relation of employer and contractor exists. 2 Thomp. on Neg. 906. In legal contemplation, the minor child is within the control of the parent, and there can be no doubt that as a general rule, the theory of the law corresponds with the actual fact. Not only does the principle we have referred to require that it should be held that a father cannot evade responsibility for the negligent manner in which his minor son does an act which he commanded to be done, but there are other strong reasons leading to the same conclusion. If a man were permitted to escape liability upon the ground here relied on, it would be easy to perpetrate great wrongs, and leave the injured person to proceed against irresponsible persons under legal disabilities; and it would also open a way for unscrupulous persons to evade liability for torts committed in their behalf, by wrongfully shifting the responsibility to those subject to their commands. The general rule is, that a father is not responsible for the torts of his minor child; but this rule does not apply to cases where the tort is committed by the child while engaged in performing work directed by the father. Where a child is engaged in the father's service, and in doing work authorized or commanded by him, he is responsible for loss resulting to others from the negligence of the child.

An instruction which assumes that certain facts constitute contributory negligence should be refused unless the facts stated are such as would make it proper for the court to decide the question of negligence as one of pure law. In this case, the question of contributory negligence was one of fact for the jury, and the court did right in refusing to instruct that certain facts, hypothetically stated in the instruction prayed, constituted contributory negligence.

The appellee was the tenant of the appellant under a lease demising to him the property described in it, and containing this provision: The lessee agrees to allow the lessor "one-half the pasturage on said land," and it is contended that the instrument did not give the appellee such possession as enabled him to maintain this action. This position is untenable. The lease vested in the lessee a right of possession to the land subject only to the lessor's right to one-half the pasturage, and this right of possession was sufficient to entitle the lessee to his action for a wrongful and unlawful

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ELLIOTT, J. Property belonging to the appellee was burned by fire, negligently and wrongfully set by the son of the appellant. The son had contracted with the father to clear the parcel of land on which the property was situated for a designated price, and in carrying out this contract, set out the fire which destroyed appellee's property. At the time the contract was made the son was not of full age, and was living with his father and treated as a member of his family. The appellant asked an instruction affirming that if the work of clearing the land had been let to the son as an independent contractor, and the injury resulted from his negligence, the appellee could not recover. The court refused to give this instruction, and this ruling presents the principal question in the case.

A son not of full age, who undertakes to do work for his father, cannot be regarded as an independent contractor in such a sense as to shield the father, who employs him to do work, from injuries resulting from his negligence. It would be pushing the rule absolving an employer from liability for the negligence of an independent contractor to an unwarrantable extent to extend it to the case of a father who contracts with his minor son. The reason, upon which rests the rule holding employers not liable for the negligence of independent contractors, fails where the contractor is the infant child of the employer. The reason supporting the rule is, that the employer has no control over the acts of the contractor

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in the performance of the work, and ought not to be held responsible for that over which he has no authority or power. The right to control is the test by which to determine whether the relation of employer and contractor exists. 2 Thomp. on Neg. 906. In legal contemplation, the minor child is within the control of the parent, and there can be no doubt that as a general rule, the theory of the law corresponds with the actual fact. Not only does the principle we have referred to require that it should be held that a father cannot evade responsibility for the negligent manner in which his minor son does an act which he commanded to be done, but there are other strong reasons leading to the same conclusion. If a man were permitted to escape liability upon the ground here relied on, it would be easy to perpetrate great wrongs, and leave the injured person to proceed against irresponsible persons under legal disabilities; and it would also open a way for unscrupulous persons to evade liability for torts committed in their behalf, by wrongfully shifting the responsibility to those subject to their commands. The general rule is, that a father is not responsible for the torts of his minor child; but this rule does not apply to cases where the tort is committed by the child while engaged in performing work directed by the father. Where a child is engaged in the father's service, and in doing work authorized or commanded by him, he is responsible for loss resulting to others from the negligence of the child.

An instruction which assumes that certain facts constitute contributory negligence should be refused unless the facts stated are such as would make it proper for the court to decide the question of negligence as one of pure law. In this case, the question of contributory negligence was one of fact for the jury, and the court did right in refusing to instruct that certain facts, hypothetically stated in the instruction prayed, constituted contributory negligence.

The appellee was the tenant of the appellant under a lease demising to him the property described in it, and containing this provision: The lessee agrees to allow the lessor "one-half the pasturage on said land," and it is contended that the instrument did not give the appellee such possession as enabled him to maintain this action. This position is untenable. The lease vested in the lessee a right of possession to the land subject only to the lessor's right to one-half the pasturage, and this right of possession was sufficient to entitle the lessee to his action for a wrongful and unlawful

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(88 Ind. 478.)

Parent and child — parent's liability for child's act as contractor.

A minor son contracted with his father to clear a parcel of land, and in doing so negligently burned property of a third person. *Held*, that the father was liable.

ACTION of damages for negligence. The opinion states the case. The plaintiff had judgment below.

C. N. Pollard, for appellant.

J. F. Elliott and *L. J. Kirkpatrick*, for appellee.

ELLIOTT, J. Property belonging to the appellee was burned by fire, negligently and wrongfully set by the son of the appellant. The son had contracted with the father to clear the parcel of land on which the property was situated for a designated price, and in carrying out this contract, set out the fire which destroyed appellee's property. At the time the contract was made the son was not of full age, and was living with his father and treated as a member of his family. The appellant asked an instruction affirming that if the work of clearing the land had been let to the son as an independent contractor, and the injury resulted from his negligence, the appellee could not recover. The court refused to give this instruction, and this ruling presents the principal question in the case.

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entry upon the land. The general rule is that a tenant in rightful possession may maintain trespass against his landlord, and the lease under examination did not affect the operation of the rule except in so far as to vest in the landlord a right of pasturage. It is clear that it did not entitle him to enter for the purpose of burning logs, stumps and brush, thus endangering the tenant's property.

Judgment affirmed.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY V. JONES.

(96 Ind. 466.)

Negligence — railroad — liability for fires — contributory negligence.

The owner of land over which a railroad runs has no right to enter thereon to remove combustibles; the accumulation of such substances thereon may warrant a finding of negligence by the company; and it is not negligent in such owner to permit dry grass and stubble to remain on his adjoining land. (See note, p. 337.)

ACTION for negligent destruction of property by fire. The opinion states the case. The plaintiff had judgment below.

W. D. Foulke and J. L. Rupe, for appellant.

NIBLACK, J. Suit by Levi M. Jones against the Pittsburgh, Cincinnati and St. Louis Railway Company for setting fire to, and causing the destruction of, certain property. The complaint was in two paragraphs. The first charged that the plaintiff was owner of a certain tract of land situate in Wayne county, and upon and adjoining the south side of the defendant's railway; that on or about the 16th day of August, 1881, the defendant carelessly and negligently permitted long and dry grass to accumulate along and upon the track of said railway, and upon its land adjoining the land of the plaintiff; that said grass was very combustible; that on that day, while the defendant was running and conducting a locomotive along said railway track, where said grass had accumulated, sparks and fire escaped from said locomotive and set fire to said grass; that the fire communicated to the premises of the

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plaintiff, and burned, consumed and destroyed two thousand and five hundred rails, which constituted a fence upon the plaintiff's land; that said fire also communicated to the grass upon the plaintiff's meadow situate upon his land, and burned up twelve acres of said meadow grass, and other property of the plaintiff, all of the aggregate value of \$250; that said fire, injury and damage were not, in any manner, caused by the act, fault or neglect of the plaintiff, but wholly by the neglect and carelessness of the defendant.

The second paragraph charged that a second fire was started by the defendant, and communicated to the premises of the plaintiff, on the 15th day of August, 1881, under circumstances substantially similar to those set forth in the first paragraph. Demurrers were severally overruled to both paragraphs of the complaint. Issue, trial by jury, verdict and judgment for the plaintiff for \$188.

[Question of pleading omitted.]

It is next insisted that the court erred in overruling the appellant's motion for a new trial, under which some questions upon the sufficiency as well as the admissibility of evidence were reserved.

With their general verdict the jury returned answers to certain interrogatories submitted to them by the court. There seems to have been evidence tending to sustain the general verdict, as well as the answers to interrogatories, and hence in that respect we see no error in the refusal of the court to grant a new trial.

At the proper time the appellant moved for judgment in its favor upon the answers to the interrogatories, claiming that those answers were inconsistent with the general verdict; but the court overruled the motion and rendered judgment for the appellee on the general verdict.

Amongst the interrogatories submitted and answered were the following:

"Did the first fire described in the complaint originate on the right of way of the defendant at the point where it passes through the land of the plaintiff? Ans. Yes.

"Did the defendant suffer grass to accumulate where the first fire ignited in a manner which an ordinarily prudent person would not permit under the same circumstances on his own land? Ans. Yes.

"Was such accumulation the proximate cause of damage to the plaintiff by the first fire? Ans. Yes.

“Was not the plaintiff as well acquainted with the condition of the grass upon the defendant’s right of way, where it passed through his land, as the defendant was? Ans. Yea.”

Similar interrogatories were submitted and answered in the same way as to the second fire described in the complaint.

It was upon these interrogatories and answers that the claim of the appellant for judgment in its favor was based, and it is argued here with much earnestness that the appellant was entitled to judgment upon them.

The theory upon which the argument for the appellant rests is, that, at the point at which the grass was permitted to accumulate, the appellant’s possession was a mere easement, the fee remaining in the appellee as the owner of the soil; that as the owner of the soil the grass belonged to the appellee, who had the right to go upon the appellant’s right of way and remove it; that as the appellee was as well acquainted with the condition of the grass upon the right of way as the appellant, he was guilty of contributory negligence in not either removing the grass or causing it to be removed.

Rights of way are of different kinds, according to the uses for which they are granted or to which they are applied. Some of them may be used by the owner of the servient estate, in common with others or with the public. Others are necessarily exclusive in their character, and inure only to the benefit of the grantee or his assigns. Of the latter class are rights of way granted to railway companies.

In the case of *Williams v. New Albany, etc., R. Co.*, 5 Ind. 111, it was held that a railway company, after having acquired the right of way for its road, is entitled to the exclusive possession of the strip of land over which its right of way extends, and stands to adjoining proprietors in the common relation existing between landed proprietors bordering upon each other. The doctrine there announced seems never to have been since questioned in this court, but rather to have been accepted as a correct exposition of the law applicable to the subject to which it relates. See also, *Thompson* on Neg. 162.

Allowing combustible material, liable to be set on fire by sparks and cinders thrown from passing locomotives, to accumulate and to remain upon and beside a railway track, where there is nothing incombustible between the land of the railway company and the

lands of adjoining owners to prevent the spread of fire, comprises a state of facts from which a jury may find negligence on the part of the railway company, and in such a case the failure of an adjoining proprietor to remove dry grass or stubble from his own land to prevent the spread of fire negligently set by the railway company, is not contributory negligence on his part. *Kellogg v. Chicago, etc., Ry Co.*, 26 Wis. 223; s. c., 7 Am. Rep. 69; *Webb v. Rome, etc., R. Co.*, 49 N. Y. 420; s. c., 10 Am. Rep. 389.

It follows that an adjoining proprietor, even though he be the owner of the servient estate, is not guilty of contributory negligence in failing to remove dry grass from the right of way of a railway company, as a precautionary measure against the spread of fire set by a locomotive.

It also follows that the court did not err in refusing to render judgment in favor of the appellant upon the interrogatories and answers set out as above.

The court permitted witnesses introduced by the appellee to answer certain questions, over the objection of the appellant, and the respective decisions of the court permitting those questions to be answered were assigned as causes for a new trial, and have been commented on in argument.

We have carefully considered all that has been said against the propriety of permitting those questions to be answered, and are unable to see that the appellant was injured by any of the answers objected to.

We have made no formal review of any of those questions and answers, because we regard what we have said as practically disposing of all the material questions fairly involved in this appeal.

The judgment is affirmed, with costs.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Richmond and Danville R. Co. v. Medley*, 75 Va. 409; s. c., 49 Am. Rep. 734.

In *Pulmar v. Mo. Pac. Ry. Co.*, 76 Mo. 217, the court refused to instruct as follows: "And further, that if you find from the evidence that dry grass, weeds and other combustible matter were allowed to remain on defendant's right of way, to which the fire was communicated (and that the fire was caused by a strong wind and could not have gone there of itself, or in any other way), thence to dry grass, weeds or other combustible matter which the plaintiff had allowed to accumulate and remain on his own land, and thus the fire was communicated to plaintiff's property and it was destroyed, then plaintiff was guilty of such contributory negligence as to prevent him from recovery in this case, and the jury must find for the defendant." The court however gave an instruction alluded to below. The court said: "The last paragraph of defendant's refused instruction, relating to the agency of the wind, was improper, as entirely ignoring the facts which the evidence tended to establish, while the instruction given by the court, above alluded to, was all, and more than defendant was entitled to. It is as follows:

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"And further, that if the jury find from the evidence in this case that dry grass, weeds or other combustible matter were allowed to remain on defendant's right of way opposite to Norton's land, which adjoined plaintiff's land on the west, and to which said fire communicated, and that said fire was caused by a strong wind which was blowing in that direction at the time on to the land of Norton, and that but for said wind the fire could not have gotten on his said land when it ignited dry grass and other combustible matter which had been allowed to accumulate and remain on Norton's land, and that the fire was by the agency of said wind, and said dry grass, etc., on Norton's land, carried thence to the plaintiff's land, where he had suffered dry grass and other combustible matter to accumulate and remain, and that plaintiff knew or might have known, by the exercise of ordinary care, of the existence of such grass and combustible matter, on both Norton's land and his own; and that in this manner the fire was communicated to plaintiff's property and it was destroyed; the plaintiff was himself guilty of such contributory negligence as to prevent him from recovering in this case, and the jury must find for the defendant."

"It is sufficient however to say, that the court gave it, and it was more favorable to defendant than it had a right to demand." And further:

"Nor is it the law, that if the railroad company negligently permit dry grass to accumulate on the right of way, and it is set on fire by a passing locomotive, and the fire is communicated to the grass in the field of an adjoining proprietor, and from that field it is communicated to the grass in the field of another, the latter cannot recover, because he permitted dry grass to accumulate on his own lands. Nor does it make any difference in such case, that the owner of the field adjoining the right of way was guilty of negligence in permitting dry grass to stand in his fence-corners adjoining the right of way. Otherwise it would be the duty of the remote owner to destroy the very crops, of the destruction of which by the company he complains."

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(86 Ind. 581.)

Mechanics' lien — public property.

A mechanics' lien will not attach to a public square and court-house.

ACTION to enforce a mechanics' lien. The opinion states the case. The plaintiff had judgment below.

G. W. Collings, for appellant.

S. D. Puett, T. N. Rice, J. T. Johnston, A. F. White and — *Hunt*, for appellees.

Howk, J. This suit was commenced on the 23d day of December, 1880, by the appellee, William H. O'Conner, as sole plaintiff, against the appellant and William A. Johnston, Sam-

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uel J. Johnston and William H. Myers, as defendants. The Johnstons and Myers are named as appellees, in appellant's assignment of errors, in this court. In his complaint the appellee O'Conner alleged in substance, that the appellant was the owner in fee of the public square, in the town of Rockville, in Parke county; that on the day of , 1879, the appellant contracted with its co-defendant, William H. Myers, for the erection and building of a new court-house on said public square; that on the day of , 187 , the defendant Myers contracted with his co-defendants, William A. and Samuel J. Johnston, partners under the firm name of Johnston Brothers, to furnish the material and do the galvanized iron work on said court-house; that on the day of , 1880, the defendants Johnston Brothers employed the appellee O'Conner as a laborer, in doing the galvanized iron work on said court-house; that he, O'Conner, did work and labor on said new court-house, from the 15th day of November, 1880, up to the day of December, 1880, working thereon 311 1-2 hours, at cents per hour; that the same remained due and unpaid; that Johnston Brothers paid appellee O'Conner for all his labor on said court-house up to November 15, 1880; but had wholly failed to pay him for any of his labor thereon after that date; that on the 22d day of December, 1880, and within sixty days from the close of and order to quit said work and labor by the defendants, Myers and Johnston Brothers, the appellee O'Conner filed in the recorder's office of Parke county a notice in writing that he would hold a lien for said sum on said new court-house and public square; that said notice was directed to the appellant, and was duly recorded by the county recorder, in a book kept in his office for that purpose; that said notice of lien was filed with and made part of the complaint, and that said lien remained due and unpaid. Wherefore, etc.

The cause was put at issue and tried by the court, and a finding was made for the appellee O'Conner, in the sum of \$108.85, and that he had acquired a mechanics' lien therefor on the new court-house and public square. Over the appellant's motion for a new trial, the court rendered judgment for appellee O'Conner for the amount found due him and costs, and for the enforcement of his lien by the sale of the court-house and public square, as other lands were sold on execution, etc.

By the record of this cause and the appellants' assignment of

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errors thereon, the principal questions presented for decision, as it seems to us, may be thus stated:

1. Upon the facts stated in appellee's complaint, did the trial court have original jurisdiction of his claim against the appellant, the county of Parke?

2. Can a mechanic's lien be acquired upon, or enforced against the court-house of a county, erected by its board of commissioners upon and constituting an essential part of the public square or site of such court-house, by a mechanic, materialman or laborer thereon?

We will consider and decide these questions in the order of their statement.

[Omitting the first question.]

2. In section 5293, R. S. 1881, in force at the time, it is provided as follows: "Mechanics, and all persons performing labor or furnishing materials for the construction or repair of any building, * * * may have a lien separately or jointly upon the building which they may have constructed or repaired, * * * for which they may have furnished materials of any description, and on the interest of the owner in the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both."

Section 5296, R. S. 1881, in force at the time, prescribes the manner in which mechanics, laborers or materialmen may acquire such liens.

Under these statutory provisions, and upon the facts alleged in the complaint of the appellee O'Conner, the important and controlling question in this case is presented for decision, namely: Can a mechanic, laborer or materialman acquire or enforce a lien for work done for or materials furnished to a contractor or sub-contractor, in and for the erection of a new court-house on the public grounds of the county, upon or against such court-house and the interest of the county in the land on which it stands, to the extent of the value of the labor done or materials furnished, or for both?

We are of the opinion that this question ought to be and must be answered in the negative. In the recent case of *Board, etc., of Pike Co. v. Norrington*, 82 Ind. 190, it was held by this court that a mechanics' lien cannot be acquired upon, or enforced against, a public bridge erected by a county board on and constituting a part of a public highway, by a mechanic, materialman or laborer. The

court said : " We do not think that such a bridge can be regarded as a ' building ' within the purview of section 647 of the Civil Code of 1852 " (§ 5293, R. S. 1881) ; " and we are clearly of the opinion that public policy forbids either the acquisition or enforcement of such a lien upon or against such a bridge."

Doubtless, a county court-house is a " building " in any and every sense of the term, and the interest of the county in the land on which it stands is that of an owner, but in trust for the use of the public, and both the building and the land are the property of the county in its political as well as in its corporate capacity. It is true that the statute of this State provides in terms for the acquisition and enforcement of a mechanics' lien upon and against " any building " ; but broad and comprehensive as are the provisions of the statute, it must be construed in such manner as will not contravene settled principles of public policy. In *Wilson v. Commissioners, etc.*, 7 W. & S. 197, it was held by the Supreme Court of Pennsylvania that the court-house and public offices of a county are not such buildings as come within the purview and meaning of the act of the assembly giving to mechanics and materialmen a lien for materials furnished for, and work done in, the construction thereof. In effect, the court said that it could not be supposed " that the legislature could have intended, in any case, to subject a county to the privation or loss of its buildings, such as court-house, public offices or jail, so indispensably necessary for the public benefit and accommodation, as also for the preservation of the public records, containing the only evidence that thousands may have for their rights, and in which, it may be truly said, that every individual of the community has a deep interest."

In *Phillips on Mechanics' Liens*, § 179, it is said : " Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally exempt from the operation of the mechanics' lien law, unless it appears by the law itself that property of this description was meant to be included ; and to warrant this inference, something more must appear than the ordinary provisions that the claim is to be a lien against a particular class of property, enforceable as judgments rendered in other civil actions." *Brinkerhoff v. Board of Education, etc.*, 37 How. Pr. 499 ; *Williams v. Controllers*, 18 Penn. St. 275 ; *Loring v. Small*, 50 Iowa, 271 ; s. c., 32 Am. Rep. 136 ; *Charnock v. District T'p, etc.*, 51 Iowa, 70 ; s. c., 33 Am. Rep.

116; *Thomas v. Board, etc.*, 71 Ill. 283; *Board, etc. v. Neidenberger*, 78 id. 58; *Poillon v. Mayor, etc.*, 47 N. Y. 666.

In *Leonard v. City of Brooklyn*, 71 N. Y. 498; s. c., 27 Am. Rep. 80, it was held by the Court of Appeals that in the absence of an express statutory provision authorizing it, a mechanics' lien cannot be enforced against the real estate of a municipal corporation held for public use. The court said: "If judgments in other actions cannot be enforced by the sale of public property, for the reason that public exigencies require that such property should be exempt from seizure and sale, certainly a judgment obtained under the lien law, which is the mere foreclosure of the notice which had previously been served and filed for work done for the benefit of the city, should stand in no better position. The act in question confers no special advantage, nor does it give a preference to a lien in any such case, and nothing is to be intended in favor of an enactment which interferes with a well-established principle, and changes a rule which has long been settled. To make such material alteration, the law should be plain, explicit and clear, and there is no ground for holding that it was the intention of the law-makers to confer upon a certain class of creditors the right to a lien upon property held for public use by a municipal government unless there is an express provision to that effect. The statute does not include such a case either in terms or by necessary implication." *Darlington v. Mayor, etc.*, 31 N. Y. 164; *City of Chicago v. Hasley*, 25 Ill. 595.

In *Ripley v. Gage County*, 3 Neb. 397, it was held by the Supreme Court of Nebraska, that the lien given mechanics, under the statutes of that State, for work done or materials furnished in the erection of any house or any other building, did not apply in the erection of public buildings for the use of a county. In the mechanics' lien law of this State there is no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use; and in the absence of such a provision, we must hold, in conformity with the weight of authority elsewhere, that such a lien can neither be acquired nor enforced upon or against such property held for such use. Our conclusion is, that the facts stated in the complaint of appellee O'Conner were not sufficient to constitute a cause of action in his favor and against the appellant, and that for this cause, its demurrer to the complaint ought to have been sustained. Obviously, therefore, it is unnecessary for us to consider or pass upon any other error complained of.

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The judgment is reversed, with costs, and the cause remanded with instructions to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

Judgment reversed.

MCCARDLE V. MCGINLEY.

(56 Ind. 538.)

Malicious prosecution — mere suit.

An action may lie for malicious prosecution although there was no arrest of person or seizure of property. (*See note, p. 346.*)

ACTION of malicious prosecution. The opinion states the case. The appellant had judgment below.

W. S. Holman and W. S. Holman, Jr., for appellant.

J. B. Coles and J. W. Gordon, for appellee.

MORRIS, C. The appellee sued the appellant for malicious prosecution. The complaint contains three paragraphs.

The first in substance alleges that the appellant maliciously and without probable cause sued the appellee upon a false and groundless account before a justice of the peace of Ohio county, Indiana. It avers that the action was tried before a jury and a verdict returned in favor of the appellee, upon which judgment was rendered in his favor; that the appellant appealed to the Ohio Circuit Court; that said action was tried in said court before a jury, who returned a verdict for the appellee, upon which judgment was rendered in his favor, on the 3d day of July, 1879; that he had been put to great trouble and expense in defending said action, in procuring witnesses, employing counsel, etc.

The second paragraph of the complaint states that on the 6th day of March, 1879, the appellant maliciously and without probable cause brought an action against the appellee before a justice of the peace of said county, on a false and fraudulent claim that she had a right to the immediate possession of certain lands described in

her complaint, and sought, in said action, wrongfully to deprive the appellee of said land ; that said action was tried before the justice and a jury, and a verdict returned in favor of the appellee, on which judgment was rendered ; that appellant appealed said suit to the Ohio Circuit Court ; that on her motion, the venue was changed to the Dearborn Circuit Court ; that the action was there tried and a verdict and judgment had for the appellee, on the 22d day of March, 1880. The appellee says he incurred great expense in giving his time in attending the trial of said cause in the courts, procuring witnesses and employing counsel, etc.

In the third paragraph the appellee alleges all the matters set forth in the first and second paragraphs of the complaint, and substantially in the same way.

The appellant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the appellant excepted.

The record states that the appellant filed her answer, but the answer is not in the record. The clerk states : " The answer was not returned with the papers — not on file." The appellee replied to the answer by a general denial.

The cause was submitted to a jury for trial, who returned a general verdict for the appellee, with answers to interrogatories propounded by each party. The view which we have taken of the case renders it unnecessary to notice them.

The appellant moved for judgment upon the special findings, notwithstanding the general verdict. The court overruled the motion. She then moved for a *venire de novo*, which motion was also overruled. A motion was then filed for a new trial, which was overruled.

The errors assigned are that the court erred in overruling the demurrer to the complaint, and in overruling the motions for judgment on the special findings, for *venire de novo*, and for a new trial.

The objection to the complaint is thus stated by the appellant : " We insist that the general weight of judicial opinion is that a civil action, being a claim of right, when the party has only been subjected to the service of a summons, and neither his person nor property nor reputation has been touched, impaired or affected, the costs which the law gives to the successful party is the measure of compensation to which he is entitled if wrongfully summoned into court."

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It is too clear for discussion that the costs which the law gives a successful party are no adequate compensation for the time, trouble and expense of defending a malicious and groundless civil action. The party sued must devote some time to the defense of the suit ; he must look up his evidence and employ counsel. This waste of time and necessary expenditure of money, by its results, affects the property of the defendant. For these expenses the costs recovered in the action are no compensation at all. In some of the States reasonable attorney fees for the successful party are included in the taxable costs. It is not so here. No good and sufficient reason can be given why he who has maliciously and without probable cause instituted a suit against another should not be required to pay the party so sued such sum as will make him entirely whole. And so a majority of the decided cases in this country hold. *Locke-nour v. Sides*, 57 Ind. 360 ; s. c., 26 Am. Rep. 58 ; *Closson v. Staples*, 42 Vt. 209 ; s. c., 1 Am. Rep. 316 ; *Whipple v. Fuller*, 11 Conn. 582 ; 29 Am. Dec. 330 ; *Marbourg v. Smith*, 11 Kans. 554 ; *Burnap v. Albert*, Taney Cir. Ct. Dec. 244 ; *Cox v. Taylor's Adm'r*, 10 B. Monr. 17.

In the case of *Closson v. Staples*, *supra*, the court says : " We are of opinion that where a civil suit is commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defense of that original suit, in excess of the taxable costs obtained by him ; and to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment or by summons only." To the same effect precisely is the case of *Whipple v. Fuller*, *supra*. In the case of *Marbourg v. Smith*, *supra*, the court says : " We suppose that an action for malicious prosecution can be maintained in any case where a malicious prosecution, without probable cause, has in fact been had and terminated, and the defendant in such prosecution has sustained damage over and above his taxable costs in the case."

We think the court did not err in overruling the demurrer to the complaint.

[Minor matter omitted.]

The judgment below must be affirmed.

PER CURIAM. — It is ordered, upon the foregoing opinion, that

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the judgment below be in all things affirmed, at the costs of the appellant.

Judgment affirmed.

Petition for a rehearing overruled.

NOTE BY THE REPORTER.—In *Muldoon v. Blokey*, Pennsylvania Supreme Court, March 22, 1883, 13 W. N. C., it was held that no action lies to recover damages for the prosecution of a civil suit, however unfounded, where there has been no interference with either the person or property of the defendant. The court said: "The action of ejectment temporarily clouds the title to the property in controversy, and so may, for the time, prevent a sale of, or mortgage upon it. But a damage of this kind is not more direct than that resulting from the expenses, loss of time, and often loss of credit, arising from the ordinary forms of legal controversy. All are troublesome, expensive, and often ruinous; and if for such damage the action of case could be maintained there would be no end of litigation, for the conclusion of one suit would be but the beginning of another. It has therefore been wisely determined, that for the prosecution of a civil suit, however unfounded, where there has been no interference with either the person or property of the defendant, no action will lie. In *Potts v. Imlay*, 1 South. 330, Chief Justice KIRKPATRICK alleged that the books, for four hundred years back, had been searched to find an instance where an action on the case for the malicious prosecution of a civil suit, like the one then trying, had been successfully maintained; and that it was conceded by the counsel for the plaintiff that no such case had been found. He also, in this connection, cites with approval the case of *Parker v. Langley*, 11th Cases, 161, wherein it was said: 'An action on the case has not yet succeeded, but only where the plaintiff in the first suit made the course of the court requiring special bail a pretense for detaining another in prison, and where the malice was so specially charged, that it appeared that the end of the arrest was not the expectation of benefit to himself by a recovery, but a design of imprisoning the other.' And in the case of *Woodmanste v. Logan*, 1 Penning. 67, the learned judge expressed a doubt whether actions for malicious prosecutions, in civil cases, will lie at all. Our own cases, whilst they do not carry the doctrine stated quite as far as those cited, do nevertheless confine actions of this kind to very narrow limits. Thus, it was held in *Kramer v. Stock*, 10 Watts, 115, that to sustain an action on the case for malicious prosecution, it was necessary that the party should have committed an illegal act, from which positive or implied damage ensued, but that to bring an action, though there was no good ground for it, was not such an illegal act. On the other hand, where one abuses legal process, as by maliciously holding one to bail, or wantonly levies an execution for a larger sum than is due, or after the payment of the debt, an action will lie against him, 'for these are illegal acts, and damage is thereby sustained.' Again, Mr. Justice SHARSWOOD, in the case of *Mayer v. Walter*, 14 P. F. S. 283, has without qualification declared, that the mere suit, however malicious or unfounded, cannot be made the ground of an action for damages." 'If,' says the learned justice, 'the person be not arrested, or his property seized, it is unimportant how futile and unfounded the action may be, as the plaintiff, in consideration of law, is punished by the payment of costs.' Then again, we have the case of *Eberly v. Rupp*, 9 Nor. 222, the very latest expression of this court upon the subject in hand, and a case much stronger in its facts than the one under consideration, for there the action was for the recovery of damages resulting from the service of a writ of estrepement. But it was held that the action could not be maintained, inasmuch as the writ, being purely preventive, neither arrested the person of the defendant nor seized his goods. It will also appear, upon the examination of the opinion in that case, that the point now under discussion is there met and disposed of. In opposition to this array of authorities the counsel for the defendant in error has produced nothing that can have weight with this court." See, *contra*, *Closson v. Staples*, 42 Vt. 209; s. c., 1 Am. Rep. 316. Counsel also cited *Pay v. Cushing*, 38 Mo. 523; *Cox v. Taylor's Adm'r*, 10 B. Monr. 17. Cooley approves the latter doctrine, *Torta*, 187, 188. Underhill (*Torta*, 99) lays down the same doctrine. Mr. Moak considers his definition defective because it "does not include an ordinary

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civil suit," and cites Cooley on Torts, 180; but on examination it will be found that Judge Cooley limits his remarks at that place to criminal proceedings (p. 181), and afterward says: "There is much good reason in what has been said in a Pennsylvania case" — *Mayer v. Walter*, *supra* — "that if 'the person be not arrested, or his property seized, it is unimportant how futile and unfounded the action might be; as the plaintiff, in consideration of law, is punished by the payment of costs.' If every suit may be retried on allegation of malice, the evil would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first."

To the same effect, in *Potts v. Imlay*, *supra*, the court said: "The courts of law are open to every citizen, and he may sue, *utiles quoties*, upon the penalty of lawful costs only. These are considered as a sufficient compensation for the mere expenses of the defendant in his defense. They are given to him for this purpose, and he cannot rise up in a court of justice and say the legislature have not given him enough." "Merely for the expenses of a civil suit, however malicious and however groundless, this action does not lie, nor ever did so far as I can find, at any period of our judicial history. It must be attended, besides ordinary expenses, with other special grievance or damage, not necessarily incident to a defense, but superadded to it by the malice and contrivance of the defendant; and of these an arrest seems to be the only one spoken of in our books."

And in *McNamee v. Minks*, 49 Md. 122, it was held that an action is not maintainable for a false and malicious prosecution of an ordinary action of ejectment wherein the plaintiff failed to recover all that he claimed, and that such action is generally maintainable only where there has been an alleged malicious arrest of the person, or a groundless and malicious seizure of property, or the false and malicious placing the plaintiff in bankruptcy, or the like. The court said: "It is true, a party may be held liable for a false and malicious prosecution of either a criminal or civil proceeding; but when it has been attempted to hold a party liable for the prosecution or a civil proceeding, it has generally been in cases where there has been an alleged malicious arrest of the person, as in the case of *Turner v. Walker*, 3 Gill & Johns. 377, or a groundless and malicious seizure of property, the false and malicious placing the plaintiff in bankruptcy, or the like. In the case of *Goslin v. Wilcox*, 3 Wils. 302, which was an action for a malicious prosecution of a civil proceeding wherein the party was arrested, it was said by Lord CAMDEN, C. J., that 'there are no cases in the old books, of actions for suing where the plaintiff had no cause of action; but of late years, when a man is maliciously held to bail, where nothing is owing, or when he is maliciously arrested for a great deal more than is due, this action has been held to lie, because the costs in the cause are not sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due.' But there is a clear and well-defined distinction between the actions for a false and malicious prosecution of a civil proceeding, and a false and malicious prosecution of a criminal proceeding. This distinction is stated in 1 Bac. Abr., tit. Action on the Case, (H) page 141, where it is said: 'But it must be observed, that there is a great difference between a false and malicious prosecution by way of indictment, and bringing a civil action: for in the latter, the plaintiff asserts a right, and shall be amerced *pro falso clamore*; also the defendant is entitled to his costs; and therefore for commencing such an action, though without sufficient grounds, no action on the case lies.' For this the author cites Salk. 14; 3 Lev. 210; Hob. 266; 3 Leon. 188 and Cro. Jac. 423. But the plaintiff declares that he has been falsely and maliciously arrested, or that by reason of a false claim maliciously asserted by the defendant, he was required to give bail, and upon failure he was detained in custody, or his property was attached, there the action lies, because of the special damage sustained by the plaintiff. It is not enough however for the plaintiff to declare generally that the defendant brought an action against him *ex malitia et sine causa per quod* he put him to great charge, etc.; but he must allege and show the grievance specially. *Savil v. Roberts*, 1 Salk. 18, 14; s. o., 1d. Raym. 374; *Goslin v. Wilcox*, 2 Wils. 305, 306; Add. on Torts (3d Eng. ed.), 590; 4 Rob. Prac. 670, 671. Otherwise, parties would be constantly involved in litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution."

On the other hand, in *Whipple v. Fuller*, 11 Conn. 581, it was held that if an action is brought and prosecuted maliciously and without probable cause, so that the defendant

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suffers damage, an action of malicious prosecution lies, although there was no arrest nor attachment.

That doctrine and decision were followed in *Woods v. Fissell*, 13 Bush, 628. The court said: "After the statute giving costs to the defendant, it was held by the common-law courts that no action could be maintained on account of the institution and prosecution of a civil action without probable cause, and therefore no action could lie for a vexatious ejectment. In all such cases the plaintiff must have gone beyond the proper remedy for the enforcement of his claim, such as procuring an illegal order of arrest, or requiring excessive bail before the action could be maintained. This entire doctrine is based on the idea that the plaintiff bringing the action is sufficiently punished, and the defendant fully recompensed by the statute requiring the plaintiff to pay all the costs. We perceive no good reason for following this rule, and denying to the defendant a remedy when his damages exceed the ordinary costs of the action. The fact that a plaintiff has been subjected to the payment of costs *per falso clamore* is no recompense to the defendant, when the latter has, by reason of the malicious proceeding on the part of the plaintiff, sustained damage. In cases where the plaintiff has mistaken his action, or been misadvised, or where, by reason of some imaginary claim, he has seen proper to sue the defendant, it is not pretended that any action for damages can be maintained; but where the claim is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery, for the expenses incurred and damages sustained, should be as fully recognized as if his property had been attached or his body taken charge of by the sheriff. While the damages may be less in the one case than the other, the legal right exists and some remedy should be afforded. If the facts alleged in these petitions are true, and they must be so treated on demurrer, it would be a singular system of jurisprudence that would admit the wrong and still withhold the remedy. * * * Following the doctrine of the common law, that *for every injury there is a remedy*, we see no reason for denying a remedy to the plaintiffs in each of these cases; and where a party seeks a judicial tribunal for the purpose alone of gratifying his malice he should be made to recompense the party injured for the damages actually sustained, and the court should see that a remedy is afforded for that purpose."

The same doctrine was adopted in *Marbourg v. Smith*, 11 Kans. 554, where the malicious prosecution was for slander. The court said: "We suppose the only question of law arising upon the last assignment of error is, whether an action for malicious prosecution can be maintained in a case like the one at bar, where neither the person nor property was seized, nor bail nor security required, and the ordinary costs of defending the alleged malicious prosecution have already been allowed. Our opinion upon this question has already been foreshadowed. We suppose that an action for malicious prosecution can be maintained in any case where a malicious prosecution, without probable cause, has in fact been had and determined, and the defendant in such prosecution has sustained damage over and above his taxable costs in the case. *Whipple v. Fuller*, 11 Conn. 591; *Cosson v. Staple*, 42 Vt. 209; s. c., 1 Am. Rep. 316; *Pangburn v. Bull*, 1 Wend. 345. At common law the defendant in such a case always has a remedy. Originally it was an action for malicious prosecution. Subsequently it was amercement of the plaintiff *pro falso clamore*. But now and in this State, as amercement is abolished, the defendant must return to his original remedy of malicious prosecution. It is an old maxim that there can be no legal right without a remedy. And the legal right in such a case has always been recognised. Indeed, it would be strange if the defendants in the case we have heretofore supposed while discussing the second and third assignments of errors should have no remedy."

In *Cosson v. Staple*, *supra*, the court say: "But where the damages sustained by the defendant, in defending a suit maliciously prosecuted without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action on the case."

It seems that the doctrine of the principal case is approved by the weight of modern authority.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

VOGEL v. MAYOR, ETC., OF NEW YORK.

(33 N. Y. 10.)

Nuisance — created by contractor — liability of principal.

Where a contractor so performs the work of his principal that it becomes a nuisance, the principal, if he accepts the work in that condition, is liable for consequent and subsequent injury to others. (*See note, p. 855.*)

ACTION for damage to real estate by water. The opinion states the case. The defendant had judgment below.

Samuel Hand, for appellant.

D. J. Dean, for respondent.

EARL, J. This action was brought to recover damages, for injuries to two houses belonging to the plaintiff, and for consequent loss and diminution of rents, by reason of water turned and caused to flow, from time to time, between August, 1858, and December, 1874, into and upon the premises of the plaintiff, situated on the south-east corner of Second avenue and Fourtieth street in the city of New York. The plaintiff was nonsuited upon the trial, and from

the judgment entered against him upon the nonsuit, he appealed to the General Term, and from affirmance there, to this court.

In reviewing this nonsuit we must take the facts as the evidence most favorable to the plaintiff tended to establish them, and they are as follows :

The plaintiff, from 1852 to the commencement of this action, owned two lots on the south-east corner of Fortieth street and Second avenue. The land between Thirty-ninth and Forty-second streets and First and Second avenues was a hill, highest at Forty-second street and First avenue, and lowest at Thirty-ninth street, and it sloped down southerly and westerly from Forty-second street toward Thirty-ninth street. A water-course crossed Fortieth street about one hundred and seventy-five feet east of Second avenue, and seventy-five feet east of the rear line of plaintiff's lots, and the surface water coming down from about twenty acres of the elevated land ran through this water-course, a natural depression in the land, toward Thirty-ninth street, and then down that street to the East river, doing the plaintiff's lots prior to 1858 no damage.

Prior to May, 1857, Fortieth street between Second and First avenues had not been regulated and graded, although the title to the land in the street belonged to the city ; but the city had established the grade of the street so that when the street should be completed it would have a descent toward the First avenue and the East river. On the 19th day of May, 1857, the city made a contract with one Kinsley to furnish all the materials and labor to regulate, grade, curb and gutter Fortieth street between the two avenues named, and he was to complete his contract on or before August 19, 1858. The plaintiff, learning that the grade of the street had been established and that the contract with Kinsley had been made, entered into a contract with a builder to erect two buildings upon his lots, in reference to the grade so established and the contract with Kinsley so made by the city. The buildings were commenced in the latter part of the summer of 1858, and were completed about May 1, 1859.

The contract with Kinsley provided that the work should be "under the supervision of the surveyor, or such person as may be appointed by the street commissioner ;" that if at any time the work should not progress according to the terms of the contract, and the street commissioner should be of opinion that the work was

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delayed, "he shall have the power to place such and so many other persons, by contract or otherwise, to work at and complete the same, as he shall deem advisable," and charge the expense of completing the work to the contractor, and deduct the amount thereof from the compensation to be paid to him under the contract; that the work would conform "to such further directions as shall be given by the street commissioner;" "that a sufficient number of persons shall be at all times employed to execute the work, the whole to be approved of by the street commissioner or such person as shall be appointed to superintend the work;" that "the contractor would commence the work within days from signing the contract, and progress therein so as to complete the same on or before the 19th day of August, 1858."

The contractor commenced to work under his contract in 1858. If he had commenced his work on the First avenue and worked toward the Second avenue, the topography of the district was such that he could have completed the contract without damaging the plaintiff. But he commenced at the Second avenue, and dug a deep hole or trench in the street, near the plaintiff's lots, and in the year 1859 he dug another hole in the street, making however but little progress with the work upon his contract. After 1859, all he did was in each year to draw a little sand from the street, and occasionally some rock, as it is to be inferred, for his own use elsewhere. In that year he practically abandoned the work, and never again resumed it. In 1873, a new man, employed, as it may be inferred, in some way by the city, took hold of the work and completed the contract. During all these years, from 1858 to the completion of the work by the new man in 1873, in consequence of the excavations made in the street, the water which had been accustomed to flow in the natural channel above described, in the times of rain, was diverted and thrown in great volumes upon plaintiff's lots, doing him great damage. The plaintiff endeavored to protect his lots against the floods, but was unable to do so. After the completion of the work, he suffered no further damage.

Upon these facts, if the city had directly through its agents caused the excavations upon its own land in the street, and thus diverted the great volume of water upon plaintiff's lots, there would have been little or no room for contention that it would not have been liable for the damage done. Its liability in such case could be based upon principles laid down and decided in *Byrnes*

v. *City of Cohoes*, 67 N. Y. 204, and *Noonan v. City of Albany*, 79 id. 470 ; s. c., 35 Am. Rep. 540 ; and other like cases.

But it is claimed on behalf of the city that it is not liable for these damages, because of the contract it had entered into with Kinsley, by whom the excavations in the street were made. The claim is that the damages were caused by the improper and negligent manner in which he performed his contract ; that he was an independent contractor, and that the city had no control over the manner in which he should perform his work, and hence was not responsible for his wrongs or carelessness, he alone being responsible upon principles laid down in *Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor*, 8 id. 222 ; *Kelly v. Mayor*, 11 id. 432 ; and other similar cases. But those cases are not in point. In *Blake v. Ferris* the defendants, having a license at their own expense to construct a sewer in one of the streets of the city of New York, entered into contract with another person to construct it at a stipulated price for the whole work, and the plaintiff was injured in consequence of the negligent manner in which the unfinished sewer was left open and unguarded in the night-time. In an action against the defendants to recover damages for the injuries thus sustained, it was held that they were not liable, for the reason that the contractor was not their agent, and that they were not responsible for his negligence. That case was criticised and questioned by COMSTOCK, J., in the case of *Storrs v. City of Utica*, 17 N. Y. 104, where he said in substance that the doctrine of *respondet superior* was correctly expounded in that case, but improperly applied. But to make that case analogous to this, suppose the contractor, after digging the trench in the street, had abandoned his work and left the trench there for weeks and years, could the defendants have escaped liability ? Could they permit an excavation which they had caused to be made in the street to remain there an indefinite time after the work had practically ceased, and claim exemption from liability because they had committed the work to a contractor ? Here if this damage had been done to the plaintiff while Kinsley was in active and proper performance of his contract, there would be some ground for claiming that the city should not be made liable for the damage resulting from the improper manner in which he performed his work. Suppose A. enters into contract with B. to do some work upon his land, his private property, and in doing this work B. does it so carelessly as to turn a

stream of water upon the land of C., and then B. abandons his contract and for years omits to proceed with it; could A. permit the water to run upon the land of C. for years, and escape liability for the damage which should thus be caused? Clearly he would be held responsible for what he had caused to be done, or suffered to be done upon his own land, to the injury of his neighbor, and he could not shield himself behind the claim that B. was an independent contractor when he did the act which first diverted the water.

In *Pack v. Mayor*, the city had made a contract with a person to grade a street, and the damage complained of was done by the carelessness of a sub-contractor in blasting rock. It was held that the person actually guilty of the careless act was liable for the damage, and that the city was not liable, as it had no control over the workmen of the contractor, could not dismiss them, or direct the manner in which the blasting should be done. In reference to a clause in the contract in that case, which bound the contractor to conform the work to such further directions as might be given by the city or its officers, the court held, as stated in the head-note, "It gives to the corporation power to direct as to the results of the work; but without control over the contractor or his workmen, as to the manner of performing it; which control alone furnishes a ground for holding the master or principal liable for the act of the servant or agent." But the plain inference is that the city in such a case is liable for the consequences of operations which are subject to its control.

The case of *Kelly v. Mayor* was similar to the case of *Pack v. Mayor*, and was disposed of upon precisely the same principles. The doctrine was again announced that to make the city liable it must have the power to direct and control the manner of performing the very work in which the carelessness occurred.

In the case now under consideration the damage was occasioned to the plaintiff after the time for the performance of the contract by Kinsley had expired, at a time when he could not, against the city, claim the possession of the street or the right to do any work therein. The damage was done because the work was improperly delayed and practically abandoned for about fourteen years, during all of which time the city had the right, by the very terms of the contract, to assume control of the work and finish it at the expense of the contractor. The city is liable because it permitted its contractor, in the execution of a contract with it, to

make these excavations in the street and to thus turn the water upon plaintiff's lots, when it had the power and right, at any time within the fourteen years, to take charge of the work, complete the contract and thus protect the plaintiff's property against injury.

The city owed plaintiff a duty, and the breach of that duty imposes the liability. The city is in the same position as it would have been if it had contracted for making the very excavations, and then had left them to do the injury complained of. This bears some analogy to the case of a continuing nuisance. One must not suffer a nuisance to continue on his premises to the injury of others, although he was not responsible for its creation. *Osborn v. Union Ferry Company*, 53 Barb. 629; *Burgess v. Gray*, 1 C. B. 578. If one employs a contractor to do a work not in its nature a nuisance, but when completed it is so by reason of the manner in which the contractor has done it, and he accepts the work in that condition, he becomes at once responsible for the creation of the nuisance, upon a principle very similar to that which makes a principal responsible for unauthorized wrongs committed by his agent by ratifying them. *Boswell v. Laird*, 8 Cal. 49.

This is not like the case supposed of a convulsion of nature causing these chasms and thus turning the water, and the responsibility of the city is not such as it would have been in that case. Here the excavations were made by agencies put in motion by the city, in the execution of a contract, for it, upon its land. The excavations were not necessarily damaging to the plaintiff; if the work had been carried to completion in a reasonable time, no serious damage would have been done, as the plaintiff's houses were not finished until 1859, nearly a year after Kinsley's contract was to have been completed. But the damage came because the excavations were needlessly, negligently and heedlessly suffered to remain in the street for an unreasonable length of time, and for that responsibility attached to the city.

We are therefore of opinion that upon the facts which the evidence tended to establish, there is no rule of law which shields the city from liability to the plaintiff for his damages, and that the nonsuit was improperly granted.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except MILLER, DANFORTH and FINCH, JJ., dissenting.

Judgment reversed.

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NOTE BY THE REPORTER. — See *Sturges v. Theol. Education Society*, 130 Mass. 414; s. c., 39 Am. Rep. 463, and note, 464. The case of *Perceval v. Hughes*, referred to in that note, has since been affirmed by the House of Lords (49 L. T. Rep. [N. S.] 189), and the following are extracts from the opinions:

By Lord BLACKBURN. "The defendant pulled down his house and had it rebuilt on a plan which involved in it the tying together of the new building and the party wall which was between the plaintiff's house and the defendant's, so that if one fell the other would be damaged. The defendant had a right so to utilize the party wall, for it was his property as well as the plaintiff's; a stranger would not have had such a right. But I think the law cast upon the defendant, when exercising this right, a duty toward the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it, but I think that the duty went as far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party wall, exposing it to this risk. If such a duty were cast upon the defendant he could not get rid of the responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfill the duty which the law cast on himself, and if they so agreed together, to take an indemnity to himself in case of mischief coming from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty and liable for the consequences if it was not fulfilled. This is the law, I think, clearly laid down in *Pickard v. Smith*, 10 C. B. (N. S.) 473, and finally in *Dalton v. Angus*, 4 App. Cas. 740; 44 L. T. Rep. (N. S.) 844. But in all the cases on the subject there was a duty cast by law on the party who was held liable. In *Dalton v. Angus*, and in *Bower v. Peate*, 1 Q. B. Div. 361; 35 L. T. Rep. (N. S.) 821, the defendants had caused an interference with the plaintiff's right of support. COCKBURN, C. J., it is true, in *Bower v. Peate*, after showing this, says: 'The answer to the defendant's contention may however, as it appears to us, be placed on a proper ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else, whether it be the contractor employed to do the work from which the danger arises, or some independent person to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.' I doubt whether this is not too broadly stated. If taken in the full sense of the words, it would seem to render a person who orders post horses and a coachman from an inn bound to see that the coachman, though not his servant, but that of the innkeeper, used that skill and care which is necessary when driving the coach to prevent mischief to the passengers. But the Court of Queen's Bench had no intention, and indeed not being a court of error, had no power to alter the law laid down in *Quarman v. Burnett*, 6 M. & W. 499. But if I am right in thinking that the defendant, in consequence of his using the party wall of which the plaintiff was part owner, had a duty cast upon him by law similar to that which in *Dalton v. Angus*, *ubi. sup.*, it was held was cast upon the defendant in that case, in consequence of his using the foundations on which the plaintiff had a right of support, it is not necessary now to inquire how far this general language should be qualified. I do not think the case of *Butler v. Hunter*, 7 H. & N. 836, is consistent with my view of the law. I do not know whether the Court of Exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the Court of Exchequer I am obliged to differ from them. If this be so, the question is, I think, narrowed to this: was the operation during which the defendant's duty required him to see that reasonable skill and care should be used, over at the time when those engaged in the work cut into the party wall between the defendant's house and Barron's; for it is not disputed that there was a want of skill in doing this and that it caused the damage, and it is not disputed that the men who did it were intending to carry out the work on which they were employed." Lord WATSON: "I agree with your lordships that it was the duty of the appellant, in carrying out his building operations, to see that reasonable precautions were taken in order to protect from injury the eastern wall of his tenement, of which the

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respondent was part owner. The appellant does not deny that many of the operations which he contemplated, and had employed a contractor to execute, were such as would necessarily, or possibly, imperil the stability of the party wall if no precautions were used, nor does he dispute that it was incumbent upon him to see that these operations were safely carried out by the contractor. What he did allege and offer to prove before the jury was that all these hazardous operations had been brought to a safe termination months before the occurrence which resulted in damage to the respondent's house. * * * But I am not satisfied that the fitting up of a wooden staircase from the basement floor of the appellant's tenement to the cellar below was an operation which could occasion no risk to the party wall. * * * The statement which was very strongly and repeatedly made regarding it was that the cutting of the wall was unnecessary and was not only unauthorized but positively forbidden. Unnecessary it certainly was, because the staircase might have been securely fixed without interfering with the wall. Unauthorized and forbidden it also was in this sense, that by the terms of the contract and relative specification the contractor was bound to leave the wall untouched. But the terms of the contract and specification are, in my opinion, of no relevancy as in a question with the respondent. If there were any reason to suppose that an ordinary workman intrusted with the job might cut into the wall, the appellant took a very proper precaution when he bound his contractor not to cut it, but he failed in his duty to the respondent when he permitted the contractor and his workmen to neglect that precaution. I am of opinion that the appellant could not establish a good defense to the respondent's claim by simply proving that it was not in the least necessary to cut the wall, and that the contractor was under an obligation not to do it. It appears to me that he could not escape from liability unless he further proved that it could not have been reasonably anticipated that any workman of ordinary skill in such operations, who was neither insane nor dishonest, would have dreamt of cutting the wall. I can find no allegation to that effect, nor do the statements made by the appellant's counsel appear to me to sustain the inference that the cutting of the wall was an act of that improbable description. It is not said that the contractor's workmen were deficient in ordinary skill, or that their act, however ill-judged, was dictated by any other motive than a desire to perform their work efficiently. In these circumstances the only inference in fact which I can draw is, that these men ought to have been specially directed not to interfere with the wall, and that care should have been taken that they obeyed the direction. These precautions ought, no doubt, to have been taken by the contractor, but in accordance with the principle laid down in *Bower v. Peats*, *ubi sup.*, and *Dalton v. Angus*, *ubi sup.*, it was no less the duty of the appellant, as in a question with the respondent, to see that they were strictly observed." Lord FRIZZERD: "The conclusion I have reached is, that the defendant had undertaken a work which, as a whole, necessarily carried with it considerable peril to his neighbors. In the execution of that work the party wall at Barron's side was so injured that it fell in, and its fall dragged down the new building, and injured the plaintiff's party wall and premises. What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant as insurers of their neighbors, or warranting them against injury. It has not however reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works so as to protect his neighbors from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being responsible for injury no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbors caused by any want of prudence or precaution, even though it may be *culpa levisima*. It seems to me that the peril to the plaintiff's house continued as long as there remained any thing to be done which could interfere with the stability of the girder on which the defendant's house rested, which the defendant had fastened into the plaintiff's party wall, and that there was that want of due supervision and due precaution which makes the defendant liable."

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PEOPLE V. FABER.

(28 N. Y. 146.)

Criminal law — bigamy — statutory construction.

The statute of bigamy prohibits the marriage of any one "having a husband or wife living." The statute of divorce prohibits the re-marriage, during the life-time of the complainant, of any person against whom a divorce has been obtained. *Held*, that one who marries in this State in violation of the latter prohibition is guilty of bigamy.*

CONVICTION of bigamy, reversed at General Term. The opinion states the point.

John McKeon, district attorney, for appellant.

Wm. F. Kintzing and *George L. Simonton*, for respondent.

RAPALLO, J. The question in this case is whether contracting a marriage in this State, in violation of section 49 of the act concerning divorces (2 R. S. 146), constitutes the crime of bigamy, as defined in 2 Rev. Stats. 687, §§ 8 and 9, or is punishable only as a misdemeanor.

The provisions of the Revised Statutes bearing upon the question are as follows: Article 1 of title 1, chapter 8, part 2, relating to marriages, provides (§ 5): "No second or other subsequent marriage shall be contracted by any person during the life-time of any former husband or wife of such person, unless (1) the marriage with such former husband or wife shall have been annulled or dissolved for some cause other than the adultery of the accused." 2 R. S. 139.

Article 3 of the same title, concerning divorces (2 R. S. 144) provides (§ 38): "Divorces may be decreed and marriages may be dissolved by the Court of Chancery whenever adultery has been committed by any husband or wife." Section 49: "Whenever a marriage shall be dissolved pursuant to the provisions of this article the complainant may marry again during the life-time of the defendant, but no defendant, convicted of adultery, shall marry again until the death of the complainant."

* See *Moore v. Hegeman*, post.

Article 2 of title 5, chapter 1 of part 4 of the Revised Statutes, entitled "of unlawful marriages and of incest" (2 R. S. 687), provides (§ 8): "Every person having a husband or wife living, who shall marry any other person, whether married or single, shall, except in the cases specified in the next section, be adjudged guilty of bigamy; and upon conviction shall be punished by imprisonment in the State prison for a term not exceeding five years."

Section 9: "The last section shall not extend to the following persons or cases:"

Then follow six subdivisions, the third of which is: "3. To any person by reason of any former marriage which shall have been dissolved by the decree of a competent court for some cause other than the adultery of such person."

Reading all these provisions together, the conclusion seems irresistible that the intent of the statute was that section 8 should extend to a divorced person who did not come within the exception. The language clearly implies, that notwithstanding the divorce, such a person is placed in the situation of having a husband or wife living for the purposes of the eighth section.

The third subdivision imports into the statute for the punishment of bigamy almost the identical language which is employed in 2 Rev. Stats. 139, § 5, subd. 1, which prohibits and declares unlawful certain marriages, the only difference being that in 2 Rev. Stats. 139, a husband or wife of the first marriage, who has obtained a divorce, is spoken of as the former husband or wife, and in subdivision 3 of section 8 the prior marriage is spoken of as the former marriage, but the intent is clear that the prohibition contained in the statutes concerning marriages and divorces shall be incorporated into the statutes punishing bigamy. The language of the latter act, where the sections are connected, is that every person having a husband or wife living, who shall marry, etc., shall be guilty of bigamy, except where the former marriage has been dissolved for some cause other than the adultery of the person contracting the subsequent marriage. There could scarcely be a plainer implication that for the purpose of enforcing the statutory prohibition, a person against whom a divorce has been obtained for that cause is regarded, by the statute, as having a husband or wife living so long as the party obtaining the divorce lives.

The judgment of the General Term in this case was based upon the case of *People v. Hovey*, 5 Barb. 117, which was decided in

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1849 by the General Term of the Supreme Court in the seventh district. In that case it was held that a violation of the prohibition against marriage of the guilty party, contained in the Divorce Act, did not constitute bigamy, and the reasons assigned for that conclusion were, that the divorce dissolved the former marriage, and after such dissolution neither party could have a husband or wife living. That consequently such a case was not included in the eighth section, and the provisions of that section could not be enlarged by the exception contained in the third subdivision of the ninth section.

This criticism on the language of the section cannot, in our judgment, overcome the clear and unmistakable intent apparent on the face of the provisions when read together. The declaration that the eighth section shall not extend to a person by reason of a former marriage which has been dissolved by the decree of a competent court for some cause other than the adultery of such person, clearly assumes that it does extend to a person whose former marriage has been dissolved for his or her adultery. If not, the third subdivision of section 9 is wholly without meaning or operation.

The same argument which was used in *People v. Hovey* was subsequently sought to be employed in the case of *Wait v. Wait*, 4 N. Y. 95. In that case the plaintiff claimed dower in lands left by a husband from whom she had obtained a divorce *a vinculo* on the ground of his adultery. There is no express provision of the statute, declaring a widow entitled to dower under such circumstances, but the right of dower is not taken away, and its continuance is impliedly recognized in section 48 of the Divorce Act (2 R. S. 146), which provides that a wife convicted of adultery in a suit for a divorce brought by her husband shall not be entitled to dower in her husband's real estate. In the case cited it was argued by Mr. Hill, that the right to dower could only be acquired by the death of the husband; that only a widow had a dowable capacity and that she must have such capacity at the time of his death; that she could be endowed of lands of her deceased husband only; that she must survive her husband, and that she must be a wife at the time of his decease or she cannot be his widow; that the marriage being dissolved she ceased to be his wife and could not be his widow. But this criticism on language was not suffered to prevail, and it was held that although the term "widow" might not be the most appropriate term to employ under these circumstances,

yet it was sufficient to designate the person entitled to dower, and the conclusion was that the divorced wife was entitled to the benefit of the statute which awards dower to the widow. A reference to section 48 of the Divorce Act (2 R. S. 146) is also instructive as showing that for some purposes the legislature apply the terms "husband" and "wife" to parties between whom a decree of divorce *a vinculo* has been pronounced. The language of section 48 is, "a wife," being a defendant in a suit for a divorce brought by her husband, and "convicted" of adultery, shall not be entitled to dower in "her husband's" real estate. The terms "husband" and "wife" are thus applied to the parties after the judgment of divorce has been rendered, without the addition of the term "former," or any other term indicating that the parties had ceased to answer the description of husband and wife.

A reference to the history of our statute against bigamy shows very conclusively that its framers intended it to apply to a case like the present one. The first act on the subject was passed February 7, 1788, and was re-enacted in 1 Revised Laws, 113, as follows:

"That if any person or persons being married, or who hereafter shall marry, do at any time marry any person or persons, the former husband or wife being alive, then any such person shall be guilty of a felony. * * * But neither this act, nor any thing therein contained, shall extend to any person or persons * * *." Then follow five specifications, the third of which is: "Nor to any person or persons who are, or shall be at the time of such marriage, divorced by the sentence or decree of any court having cognizance thereof."

In framing the provisions of the Revised Statutes it is stated by the revisers in their original note to section 8 (the statute against bigamy), that it was the same as 1 Revised Laws, 113, varied by inserting "whether married or single," to reach cases not supposed to be within the act, and the note to section 9 states that the first five subdivisions are founded upon 1 Revised Laws, 113, the third being qualified according to 2 Revised Laws, 198, section 4. Section 4 here referred to is contained in the divorce law of 1813, and is the provision that it shall not be lawful for the defendant, who may be convicted of adultery, to marry again until the complainant shall be actually dead. It cannot be doubted that the intention of the revisers was to bring a violation of this prohibition within the statute against bigamy.

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The new Penal Code, adopted in 1881, re-enacts the statute in the same language as in the Revised Statutes, except that it has added to the third subdivision of section 9 a further exception in favor of a divorced party who has obtained permission from the court to marry again, pursuant to the act authorizing such permission to be given.

Upon the theory of the respondent all these elaborate provisions are senseless and without any effect whatever.

The utility of the prohibition of such marriages it is not for us to discuss here. So long as it stands upon the statute book we are bound to give it force in the manner prescribed by the legislature, when the violation of it is committed within this State.

The judgment appealed from should be reversed, and that of the Court of General Sessions affirmed and the proceedings remitted.

All concur, except ANDREWS, J., who dissents on the ground that the construction of the statute on bigamy by the General Term in *People v. Hovey*, 5 Barb. 117, has never been reversed or questioned in any judicial decision until now, and EARL, J., who dissents generally.

Judgment reversed.

BERTLES V. NUNAN.

(92 N. Y. 152.)

Deed — marriage — tenancy by entirety.

Under a joint conveyance to husband and wife they hold as tenants by the entirety, and the survivor takes the whole estate, notwithstanding the married women's enabling statutes.

ACTION to compel defendants to complete purchase of land under surrogate's sale. The opinion states the point.

Spencer Clinton, for appellant.

Tracy C. Becker, for respondent.

EARL, J. On the 1st day of August, 1868, certain land, which is the subject of this controversy, was conveyed by deed to Cornelius Day and Hannah Day, his wife, and to their heirs and assigns;

and the sole question for our determination is whether the grantees took the land as tenants in common, or whether each took and became seised of the entirety.

By the common law, when land was conveyed to husband and wife they did not take as tenants in common, or as joint tenants, but each became seised of the entirety, *per tout et non per my*, and upon the death of either the whole survived to the other. The survivor took the estate, not by right of survivorship simply, but by virtue of the grant which vested the entire estate in each grantee. During the joint lives the husband could, for his own benefit, use, possess and control the land, and take all the profits thereof, and he could mortgage and convey an estate to continue during the joint lives, but he could not make any disposition of the land that would prejudice the right of his wife in case she survived him.

This rule is based upon the unity of husband and wife, and is very ancient. It must have had its origin in the archaic period of our race, and it colored all the relations of husband and wife to each other, to the law and to society. In 1 Blackst. Com. 442, the learned author says: "Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties and disabilities that either of them acquired by the marriage. I speak not, at present, of the rights of property, but of such as are merely personal. For this reason a man cannot grant any thing to his wife or enter into covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself." They were not allowed to give evidence against each other, mainly because of the union of person, for if they were admitted to be witnesses for each other they would contradict one maxim of the common law, *nemo in propria causa testis esse debet*; and if against each other, they would contradict another maxim, *nemo tenetur se ipsum accusare*.

As one of the consequences of the same rule, the husband was made responsible to society for his wife. He was liable for her torts and frauds, and in some cases, for her crimes.

This and the other rules regulating the effect of marriage at common law were not designed to degrade and oppress the wife. Blackstone (2 Com. 445) says: "Even the disabilities which the wife lies under are, for the most part, intended for her protection and benefit; so great a favorite is the female sex of the laws of England."

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The common-law rule as to the effect of a conveyance to husband and wife continued in force, notwithstanding the Revised Statutes, which provided that "every estate granted or devised to two or more persons in their own right shall be a tenancy in common unless expressly declared to be in joint tenancy." 3 R. S. 2179 (7th ed.) ; *Dios v. Glover*, 1 Hoff. Ch. 71 ; *Torrey v. Torrey*, 14 N. Y. 430 ; *Wright v. Saddler*, 20 id. 320. In the latter case Comstock, J., said : "It appears to be well settled that this statute does not apply to the conveyance of an estate to husband and wife. They are regarded in law as one person."

But the claim is made that the legislation in this State, in the years 1848, 1849, 1860 and 1862, in reference to the rights and property of married women, has changed the common-law rule so that now when land is conveyed to husband and wife they take as tenants in common, as if unmarried. In construing these statutes the rule must be observed, and usually has been observed, that statutes changing the common law must be strictly construed and that the common law must be held no further abrogated than the clear import of the language used in the statute absolutely requires.

Section 3 of chapter 200 of the Laws of 1848, as amended by chapter 375 of the Laws of 1849, provides that "any married female may take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, or any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband or be liable for his debts." It is not the effect of this section, and plainly was not its purpose, to change the force and operation of a conveyance to a wife. It does not enlarge the estate which a wife would otherwise take in land conveyed to her, and whatever the effect of a conveyance to a husband and wife was prior to that statute, so it remains. If the operation of such a conveyance was to convey the entire estate to each of the grantees, so that each became seised of the entirety, there is nothing in the force or effect of the language used to change the operation of such a deed so as to make the grantees tenants in common. The section gives the wife no greater right to receive conveyances than she had at common law, but its sole purpose was to secure to her during coverture, what she did not have at common law, the use, benefit and control of

her own real estate, and the right to convey and devise it as if she were unmarried.

By section 1 of the act (Chapter 90 of the Laws of 1860) it is provided that "the property, both real and personal, which any married woman now owns as a sole and separate property; that which comes to her by descent, devise, bequest, gift or grant; that which she acquires by her trade, business, labor or services, carried on or performed on her sole and separate account; that which a woman married in this State owns at the time of her marriage, and the rents, issues and profits of all such property, shall notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts;" and in section 3 of the act of 1860, as amended by the act chapter 172 of the Laws of 1862, it is provided that "any married woman possessed of real estate as her separate property may bargain, sell and convey such property, and enter into any contract in reference to the same, with the like effect, in all respects, as if she were unmarried." There is great plausibility in the claim that these provisions in the acts of 1860 and 1862 have reference only to the separate property of a wife, which she owns separate from her husband, and that they have no reference whatever to land conveyed to husband and wife, in which, by the common law, each became seised of the entirety. The language is not so strong and direct as that of the Revised Statutes, which provided that a grant to two or more persons shall create a tenancy in common, and which was yet held not to make husband and wife tenants in common. But it is not necessary now to determine that these provisions of law do not apply to lands conveyed to husband and wife, and we pass that question. It is sufficient now to hold that they do not limit or define what estate the husband and wife shall take in lands conveyed to them jointly. Their utmost effect is to enable the wife to control and convey whatever estate she gets by any conveyance made to her solely or to her and others jointly.

The claim is made that the legislation referred to has destroyed the common-law unity of husband and wife, and made them substantially separate persons for all purposes. We are of the opinion that the statutes have not gone so far. The legislature did not intend to sweep away all the disabilities of married women depend-

ing upon the common-law fiction of a unity of persons, as a brief reference to the statutes will show. The act of 1848 gave no express authority to a married woman to grant or dispose of her property; such authority came by the act of 1849. The legislature clearly understood that the common-law unity of husband and wife, and the disabilities dependent thereon still remained, notwithstanding those acts, because in 1860, by the act of that year, it empowered a married woman to perform labor and to carry on business on her separate account; to enter into contracts in reference to her separate real estate; to sue and be sued in all matters having relation to her property, and to maintain actions for injuries to her person. Until 1867 (chap. 782) husbands retained their common-law right of survivorship to the personal property of their wives. It was not until chapter 887 of the laws of the same year, that husband and wife could, in civil actions, be compelled to give evidence for or against each other; and in 1876 (chap. 182), for the first time, they could be examined in criminal proceedings as witnesses for each other; and provision was first made in the Penal Code (§ 715) that they could, in criminal proceedings, be witnesses for and against each other.

From this course of legislation it is quite clear that the legislature did not understand that the common-law rule as to the unity of husband and wife had been abrogated by the acts of 1848, 1849 and 1860, and that whenever it intended an invasion of that rule, it made it by express enactment. Still more significant is the act chapter 472 of the Laws of 1880, which provides that "whenever husband and wife shall hold any lands or tenements as tenants in common, joint tenants or as tenants by entireties, they may make partition or division of the same between themselves," by deed duly executed under their hands and seals. Here the disability of husband and wife, growing out of their unity of person, to convey to each other is recognized, as is also the estate by entireties created by a deed to them jointly.

So the common-law incidents of marriage are swept away only by express enactments. The ability of the wife to make contracts is limited. Her general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute. A husband still has his common-law right of tenancy by the curtesy. Although section 7 of the act of 1860 authorizes a married woman to maintain an action against any per-

son for an injury to her person or character, yet we have held that she cannot maintain an action against her husband for such an injury; and so it was held, notwithstanding the acts of 1848, 1849 and 1860, that the common-law disability of husband and wife growing out of their unity of person to convey to each other still existed. *White v. Wager*, 25 N. Y. 383; *Winans v. Peebles*, 32 id. 423; *Meeker v. Wright*, 76 id. 262, 270. It is believed, also, that the common-law rule as to the liability of the husband for the torts and crimes of his wife is still substantially in force.

We fail, therefore, to find any reason for holding that the common-law rule as to the effect of a conveyance to husband and wife has been abrogated, and this conclusion is sustained by considerable authority. In *Goelet v. Gori*, 31 Barb. 314, SUTHERLAND, J., at Special Term, held that a lease for a term of years, executed to husband and wife, was unaffected by the acts of 1848 and 1849, and that husband and wife by conveyances to them still took as tenants by the entirety. In *Farmers and Mechanics' Nat. Bk. of Rochester v. Gregory*, 49 Barb. 155, it was held at General Term that the statutes referred to had no relation to or effect upon real estate conveyed to husband and wife jointly, and that in the case of such a conveyance, notwithstanding those statutes, they take as tenants by the entirety. JOHNSON, J., commenced his opinion by saying: "To my mind it is a very clear proposition that our recent statutes for the better protection of the separate property of married women have no relation to or effect upon real estate conveyed to husband and wife jointly." That decision was rendered in 1867, and the conveyance which was there the subject of consideration was executed in 1864. In *Miller v. Miller*, 9 Abb. Pr. (N. S.) 444, MURRAY, J., at Special Term, in 1871, feeling bound by the decision last referred to, held, that the common-law rule was applicable to a conveyance made to husband and wife in 1867. In *Freeman v. Barber*, 3 N. Y. Sup. Ct. (T. & C.) 574, the same rule was applied in 1874 by the Supreme Court in the third department. The opinion of the court was written by MILLER, P. J., in which he stated that he regarded the law as settled in this State, that in the case of a conveyance to husband and wife, they take, not as joint tenants or as tenants in common, but as tenants by entireties, notwithstanding the acts referred to. In *Beach v. Hollister*, 3 Hun, 519, decided in 1875, a similar decision was made. GILBERT, J., writing the opinion of the court, said:

"These statutes operate only upon property which is exclusively the wife's, and were not intended to destroy the legal unity of husband and wife, or to change the rule of the common law governing the effect of conveyances to them jointly." In *Ward v. Crum*, 54 How. Pr. 95, decided in 1876, VAN VORST, J., at Special Term, held that under a deed executed to husband and wife in 1872, both became seized of the entirety, although the wife paid the entire consideration of the conveyance.

It is true that these decisions are not absolutely binding upon this court, but they settled the law in the Supreme Court. For twenty years after 1849 there was no decision or published opinion in this State in conflict with them, and they are, under the circumstances, entitled to great weight here. They undoubtedly lay down a rule which has been followed and observed by conveyancers, and we have no doubt that property to the value of millions is now held under conveyances made in reliance upon the common-law rule as thus expounded. These decisions were never questioned in this State by any court until the decision in the case of *Meeker v. Wright*, which was rendered in this court in 1879, 76 N. Y. 262. In that case the learned judge writing the opinion reached the conclusion that the common-law rule governing conveyances to husband and wife had been abrogated by the modern legislation in this State. But that portion of the opinion was not concurred in by a majority of the judges. The views of that judge were very forcibly and ably expressed, and they have been reconsidered. They do not convince us that the conclusions he reached should be adopted by this court. That case is supposed to have unsettled the law somewhat in this State. In *Feely v. Buckley*, 28 Hun, 451, it was held upon its authority, by a divided court, that tenancy by the entirety is abrogated by the Married Women's Acts; and upon the same authority it is said a similar holding was made in *Zornlein v. Brown*, decided in the Superior Court of New York, in January of this year, by a divided court. It is also said that in *Forsyth v. McCall*, in the fourth department in June, 1880, and in *Meeker v. Wright*, after a new trial, in the third department, in April, 1882, it was decided that the common-law rule was not abrogated. 27 Alb. L. J. 199. And these decisions, together with the one which is now under review, are all the decisions made in this State since the case of *Meeker v. Wright* was in this court, which have come to our attention.

Legislation similar to that which exists in this State, as to the rights and property of married women, exists in many of the States of the Union, and the decisions are nearly uniform in all the other States where the question has arisen, that a conveyance to husband and wife has the common-law effect, notwithstanding such legislation. Without citing all we call attention to the following cases and authorities: *Bates v. Seeley*, 46 Penn. St. 248; *French v. Mahan*, 56 id. 289; *Diver v. Diver*, id. 106; *Fisher v. Provin*, 25 Mich. 350; *McDuff v. Beauchamp*, 50 Miss. 531; *Washburn v. Burns*, 34 N. J. 18; *Chandler v. Cheney*, 37 Ind. 391; *Marburgh v. Cole*, 49 Md. 402; s. c., 33 Am. Rep. 266; *Bennett v. Child*, 19 Wis. 362; *Robinson v. Eagle*, 29 Ark. 202; 1 Washb. on Real Prop. (3d ed.) 577; Schou. Husb. and Wife, §§ 397, 398; 1 Bish. Marr. Women, 438, §§ 613, etc.; 2 id. 284, § 284. In the last section the learned author says: "Under the late married women's statutes, the effect of which is to prevent any part of the wife's interest in her lands passing to her husband, the rule of the common law, by force of which the two became tenants by the entirety of lands conveyed to both, is not changed," and he says: "The reason for the doctrine, looking at the question in the light of legal principle, is, that the statutes which preserve to married women their separate rights of property do not have, or profess to have, any effect upon the capacity of the wife to take property, or the manner of her taking it, but when she does take they simply preserve the right in her, to her separate use, forbidding it to pass in part or in full to her husband under the rules of the unwritten law. If, then, land is conveyed to a husband and his wife, they take precisely as at the common law — that is, as tenants by the entirety." In *Diver v. Diver*, STRONG, J., said: "But it is said the act of 1848, by destroying the legal unity of the husband and wife, has converted such an estate into a tenancy in common; that is, that such a deed conveys a different estate from that which the same deed would have created if made prior to the passage of the act. To this we cannot assent. It mistakes alike the letter and the spirit of the statute, imputing to it a purpose never intended. The design of the legislature was single. It was not to destroy the oneness of husband and wife, but to protect the wife's property, by removing it from under the dominion of the husband. To effect this object she was enabled to own, use and enjoy her property, if hers before marriage, as fully after marriage as before, and the act

declared that if her property accrued to her after marriage, it should be owned, used and enjoyed by her as her own separate property, exempt from liability for the debts and engagements of her husband. All this had in view the enjoyment of that which is hers, not the force and effect of the instrument by which an estate may be granted to her. It has nothing to do with the nature of the estate. The act does not operate upon rights accruing to her until after they have accrued. It takes such rights of property as it finds them, and regulates the enjoyment, that is the enjoyment of the estate after it has vested in the wife."

At common law where the estate was conveyed to husband and wife, as above stated, the husband had the control and use of the property during the joint lives. It is unnecessary now to determine whether, under the Married Women's Acts in this State, the husband still has such a right in real estate conveyed to him and his wife jointly. It was said in some of the authorities cited that the statutes had changed that common-law rule, and that while husband and wife, in conveyances to them jointly, each took the entirety, yet that the land could not be sold for the husband's debts, or the use and profits thereof during their joint lives be entirely appropriated by him. It is not important in this case to determine what the relation of the wife to the land, in such a case, now is, during the life of her husband.

It is said that the reason upon which the common-law rule under consideration was based has ceased to exist, and hence that the rule should be held to disappear. It is impossible, now, to determine how the rule, in the remote past, obtained a footing, or upon what reason it was based, and hence it is impossible now to say that the reason, whatever it was, has entirely ceased to exist. There are many rules appertaining to the ownership of real property originating in the feudal ages, for the existence of which the reason does not now exist, or is not discernible, and yet, on that account, courts are not authorized to disregard them. They must remain until the legislature abrogates or changes them, like statutes founded upon no reason, or upon reasons that have ceased to operate.

It was never, we believe, regarded as a mischief, that under a conveyance to husband and wife they should take as tenants by the entirety, and we have no reason to believe that it was within the contemplation of the legislature to change that rule. Neither do

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we think that there is any public policy which requires that the statute should be so construed as to change the common-law rule. It was never considered that that rule abridged the rights of married women, but rather that it enlarged their rights, and improved their condition. It would be against the spirit of the statutes to cut down an estate of the wife by the entirety to an estate as tenant in common with her husband. If the rule is to be changed it should be changed by a plain act of the legislature, applicable to future conveyances ; otherwise incalculable mischief may follow by unsettling and disturbing dispositions of property made upon the faith of the common-law rule. The courts certainly ought not to go faster than the legislature in obliterating rules of law under which many generations have lived and flourished and the best civilization of any age or country has grown up.

We are therefore of opinion that the judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except DANFORTH and FINCH, JJ., who dissent

HOUGHKIRK V. PRESIDENT, ETC., DELAWARE, ETC., Co.

(38 N. Y. 312.)

Negligence — railroad — flagman.

In an action against a railroad company for an accident at a crossing, it is error to leave it to the jury to determine whether the omission to have a flagman at the point was negligent.*

ACTION of negligence for death of plaintiff's intestate. The opinion states the point. The plaintiff had judgment below

Henry Smith, for appellant.

E. Countryman, for respondent.

FINCH, J. [Omitting other matters.] But we must reverse the judgment rendered for an entirely different reason. The accident

* See *Pittsburgh, etc., R'y Co. v. Yundt* (78 Ind. 373), 41 Am. Rep. 589.

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occurred, not at a street crossing, but upon the premises of the defendant, at a point opposite a bridge owned by the railroad company, whose road defendant leased and operated, leading from Van Rensselaer island, and where it was contended the plaintiff had a right to cross the tracks derived from the payment of toll to the agent of the defendant. There was no flagman present at the scene of the accident, and this circumstance led to an erroneous ruling. The plaintiff requested the court to "leave it to the jury as a question of fact to say whether, under all the circumstances disclosed by the evidence, defendant should have had a flagman at the crossing." The court answered: "I have done so," and the defendant excepted. The court then added: "I said I would not charge as matter of law whether the company was or was not bound to have a flagman there. It was a question for the jury to say under the circumstances;" and the defendant again excepted. The charge in this respect was substantially the same as that in *Grippen v. N. Y. C. R. Co.*, 40 N. Y. 41, for which the judgment was reversed. In both instances the jury were allowed to find that due care required the presence of a flagman, and that the omission to station one at the crossing was negligence on the part of the railroad company. The last thing said to the jury in the present case, the final impression made upon their minds was, that even if the defendant was prudent and careful in the running of its train, and guilty of no negligence in its approach to this crossing, yet the jury might find that due care required the presence of a flagman, and for the omission of that specific precaution the company was chargeable with negligence. The true rule and the proper distinctions were well stated in *McGrath v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 528. It was there said it would be error for a judge to instruct a jury that it is the duty of a railroad company to keep a flagman at a crossing, or "to submit to a jury the question whether it ought to have kept a flagman there." And the reason was carefully pointed out. A railroad company is not bound and owes no duty so to station a flagman, and negligence cannot be predicated of the omission. The fact may be proven as one of the circumstances under which the train moved, and by which the degree of care requisite in its handling and running may be affected; so that the question never is whether there should have been a flagman, or one ought to have been stationed at the crossing, but whether, in view of his presence or absence, the train was moved

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with prudence or negligence. The final charge in this case left to the jury whether the company was or was not bound to have a flagman at the crossing, and whether the defendant should have had one there, and so permitted the jury to predicate negligence upon the omission. We have sought in vain to give the language used any other construction. In the body of the charge the question of negligence was very properly presented, and it is quite likely that in the collision of request and answer, at its close, the form and language used was not closely observed; but its purport was very plain, and it is evident that the jury were liable to be misled by it. They must have gone to their deliberations with the final impression upon their minds that they were at liberty to find that the defendant ought to have stationed a flagman at the crossing, and that omission constituted negligence, upon which a verdict could be founded. For this error we think there should be a new trial.

The judgment should be reversed and a new trial granted, costs to abide the event.

Judgment reversed.

All concur, except DANFORTH, J., not voting.

GRATTAN V. METROPOLITAN LIFE INSURANCE COMPANY.

(92 N. Y. 274.)

Insurance — life — "good health" — report of medical examiner — evidence — communications to physicians.

A warranty in an application for insurance upon the life of a third person that the person sought to be insured is in good health simply means that he is well to ordinary observation and in outward appearance.

Where the applicant for insurance upon the life of a third person, gives true answers to the medical examiner, but the latter writes down a different and untruthful answer in his report, the applicant being ignorant thereof, the insured is not responsible therefor.

A physician, called on to make a professional examination of a patient, may not be allowed to testify as to his opinion of his health based on "general sight" before the examination or any conversation with him.

ACTION on a life insurance policy. The opinion states the points. The plaintiff had judgment below.

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William H. Arnoux, for appellant.

James Lansing, for respondent

FINCH, J. The defendant resists the verdict rendered in this action upon numerous grounds, the first of which is, that there was a breach of warranty by the insured as to the health of his brother Terence ; that there was no conflict of evidence to carry the question to the jury ; and that the charge of the court upon the subject was erroneous. There was much and very strong evidence, that for a considerable period just before the warranty of the applicant that his brother's health was good, Terence was in fact ill, and was emaciated, weak, and had a consumptive cough. His employers so testify, and that as a consequence, they sent him to their own medical adviser, Dr. Mareness, to be examined, upon whose report he left their employ as unable longer to endure the labor required. On the other hand, witnesses were examined who testified that during the same period he appeared to be in good health, that he looked like a healthy man, and gave no indications to the contrary. The controversy therefore revolves about the true meaning of good health as used in the words of warranty ; the appellant contending that it means good, in fact actual freedom from illness or disease, and that so understood, there was no dispute about the facts since the sickness of Terence was proved, and the plaintiff's evidence never went beyond mere appearances and raised no issue over the real fact. But it must be remembered that the question put and the answer given related not to the applicant's own health but to that of a third person. Unless in rare and exceptional cases the insured answering could only answer from physical appearances and indications. He could not have the knowledge that an individual has of his own condition, though even in such case self-deception is not rare, and very often entirely innocent and honest. Such an inquiry and its answer must necessarily be understood in a general and ordinary, and not in a strict and rigid sense. One who is not a doctor and speaks not of himself but of a third person, necessarily gives rather an opinion founded on observed facts than an absolute and accurate fact when he describes the health of such person as good. He means, and is understood to mean, that the individual inquired about has indicated in his action and appearance no symptoms or traces of disease, and to the

observation of an ordinary friend or relative is in truth well. He means that, because he cannot usually mean any thing else; and the insurer naturally and necessarily must so understand question and answer, and considered as a warranty, the answer warrants what it means and nothing more. The authorities almost if not quite without exception, justify this view of the scope and meaning of an answer warranting the good health of a third person. *Cushman v. U. S. Life Ins. Co.*, 70 N. Y. 76; *Peacock v. N. Y. Life Ins. Co.*, 20 id. 293. Upon such view of the law the plaintiff's evidence was admitted, and the question of the truth of the warranty submitted to the jury. The criticism upon the charge is that it confused the distinctions between a representation and a warranty, and substituted the honest belief of the applicant in the room of the actual fact. Some portions of the charge spoke of the answer given by the applicant as a representation, and of its falsity, if false, as a misrepresentation; but at the close of the charge its language and purport in this respect were challenged, and the court thereupon carefully explained its meaning. The learned counsel for the defendant asked the court to charge that the applicant "was bound at his peril to know the truth of every statement that he made, and whether intentionally or otherwise, if in fact any statement that he made was not true, under the warranty it vitiated the policy." The court so charged, and added by way of explanation, and to make clear the meaning intended to be conveyed, "that if from all the appearances of the brother he was in good health; in fact in good health, so that everybody would so pronounce him; and there was nothing to indicate to any person that he was not in good health," then the warranty was not broken, although in fact the germs of a lurking and hidden disease might exist. All difficulty as to the difference between representation and warranty was thus cleared away, and the meaning to be attached to the latter definitely stated, and we think correctly. A question of fact was thereby raised for the jury. While the evidence of Jeffers and of Warren showed the existence of ill health, the symptoms of which were plainly apparent, and their conduct in sending him to Dr. Mareness for examination, and his in submitting to it, and thereupon ceasing work furnishes very strong evidence of ill health, both actual and apparent, yet there is a considerable array of evidence in the contrary direction. Warren admits that he had before sworn he was not aware that Terence was a sick man until he re-

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turned with a paper from the doctor. Noelte, with whom Terence boarded, describes him as not sick and showing no such appearance; Fleming and Lewis, with whom he worked, say his health was good to their observation; Eicholz, the agent of the company, took his application for insurance, and the defendant's medical examiner certified the risk in the usual manner. Where the truth is in this contradiction it is difficult to say. Both the actual condition and the observable condition of Terence's health at the date of the warranty were put in doubt by the proofs, for the fair inference from the plaintiff's evidence, taken by itself, was not only that Terence seemed well, appeared well, but actually was in good health. The question of fact was submitted to the jury in terms quite as favorable to the defendant as the law of the case required, and their conclusion is beyond our review.

Another objection to the recovery is founded upon the answer given by the applicant to the medical examiner of the company which in the written statement denies, on the part of the insured, knowledge of the cause of his sister's death.

The question is serious. It is conceded that the sister of the insured, before his own application, died of consumption; that the insured knew the fact; that it was material to the action of the insurance company, which was entitled to know the truth; that the fact was concealed, and a false answer that the applicant did not know, was made, either by the applicant or the medical examiner; that the false answer was in fact written down by the latter; but that the insured told him the precise truth and the actual fact. The controversy is thus narrowed to the single question, who was responsible for the falsehood; was the insured chargeable with it, or was it the sole fault of the company through its medical examiner? On the face of the papers it was the insured. His application, signed by him, and with knowledge of the contents of which he is *prima facie* chargeable, declares and warrants that his answers to the questions therein contained, "and to those in the examiner's report herewith are fair and true." The examiner's report contains the falsehood; and appended to that is the certificate of the insured, signed by him, in these words, viz.: "I hereby declare that I have given true answers to all questions put to me by the medical examiner, that they agree exactly with the foregoing, and that I am the same person described in the accompanying application, and whose signature is appended to declaration and war-

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rant herewith." This certificate in terms confesses that the questions appearing upon the paper to have been answered by the applicant were in truth answered by him ; that they were written out upon the paper before its signature by the applicant ; that as so written they agree exactly with the answers made ; and that the insured knew that fact and had knowledge of how they were written. Stopping at this point the case is clear. It is one in which the truth is told to the medical examiner ; where the latter, instead of the truth, writes down a falsehood ; where the applicant reads and knows the answer that is written, and with full knowledge of its falsity as written certifies that it is true and " agrees exactly " with the answers in fact made. This is the applicant's written admission. It is conclusive upon him, unless by some sufficient proof he explains and rebuts it. If he did read the answers as written, if he knew of its presence and still certified to its truth, the fraud was his. The medical examiner might write down the untruthful answer by mistake or inadvertence, but the applicant could not read it and then certify to its truth without fraud. It is evident therefore that no proof can explain and answer the applicant's certificate which falls short of showing either that the answer was not written when the certificate was signed, or at least was not known to the insured when he made such signature. In a former case against the same defendant the first of these facts was proved. *Grattan v. Met. Life Ins. Co.*, 80 N. Y. 292 ; s. c., 36 Am. Rep. 617. In that case the referee expressly found that the whole of the medical examiner's certificate was in blank and the cause of the sister's death was unwritten when the applicant signed it. In *Mowry v. Rosendale*, 74 N. Y. 361, the same fact appeared. The applicant signed a blank and trusted to the agent of the company to fill it up thereafter. In *Maher v. Hibernia Ins. Co.*, 67 id. 283, there was proof that the incorrect language of the policy was pointed out by the insured, but he was prevented from having the same corrected, or was thrown off his guard, and dissuaded therefrom by the acts or declarations of the agent of the insurer. The insured must show a state of facts indicating honesty and truthfulness on his part, and leaving the burden of having declared an untruth solely upon the agent of the company.

[Omitting a minor point.]

The question asked Dr. Mareness, viz. : " what opinion did you form, based on the general sight of the man, before you made a

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examination, or before you had any conversation with him?" was properly excluded as privileged within the statute. The doctor had never seen him before, nor seen him since. His whole knowledge came from the one interview, which was wholly and purely of a professional character. We have distinctly held in such a case that the communication to the physician's sense of sight is within the statute, and as much so as if it had been oral and reached his ear (*Grattan v. Met. Life Ins. Co.*, 80 N. Y. 297; s. c., 36 Am. Rep. 617), and that information derived from observation of the patient's appearance and symptoms must not be disclosed. *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185. The case here is not like *Edington v. Aetna Life Ins. Co.*, 77 id. 564. There the physician had seen the patient, both before and after he attended him professionally. He had a possible knowledge derived from observation when no professional relation existed. Here such relation began upon the instant that Terence came into his presence and continued until he disappeared from view. No information so acquired could be disclosed.

[Omitting a minor consideration.]

Some other exceptions taken have been examined, but do not require special consideration.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except EARL, J., not voting.

BARRY V. NEW YORK CENTRAL, ETC., RAILROAD COMPANY.

(23 N. Y. 200)

Negligence — duty of railroad to implied license.

Where a railroad company have for more than thirty years without objection permitted the public to cross its track at a certain point not in itself a public crossing, it owes the duty of reasonable care toward those so using the crossing.

ACTION of damages for negligently causing the death of plaintiff's intestate. The opinion states the point. The plaintiff had judgment below.

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Essek Cowen, for appellant.*Martin I. Townsend*, for respondent.

ANDREWS, J. If the absolute legal right of the intestate to be upon the track of the defendant at the place of injury was a material question in the case, it may have been error in the court to have submitted to the jury to find whether such right existed under the deed from Cushman and Norton to Paine and Buell. But we are of opinion that the question was quite immaterial to the determination of the controversy. It is undisputed that the owners of lots abutting on the railroad at this point had a right of way across the defendant's tracks, and that for more than thirty years the public were in the habit of crossing the tracks at this point to reach Madison and other streets lying northerly and easterly of the railroad, the proof being that several hundred people crossed there every day. There can be no doubt that the acquiescence of the defendant for so long a time, in the crossing of the tracks by pedestrians, amounted to a license and permission, by the defendant, to all persons to cross the tracks at this point. These circumstances imposed a duty upon the defendant in respect of persons using the crossing, to exercise reasonable care in the movement of its trains. The company had a lawful right to use the tracks for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but so long as it permitted the public use, it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. It is doubtless true that the owner of the premises owes no duty to keep them in such condition that an intruder, or a person casually thereon by sufferance, shall not be injured. The quarry case (*Hownsell v. Smyth*, 97 Eng. Com. Law, 731) is an apt illustration. There the plaintiff in crossing the defendant's waste land, which the public had been allowed to cross, fell into an unguarded excavation, and the court held that the plaintiff had no cause of action, because the defendant was under no legal duty to fence or otherwise guard the excavation for his protection. The plaintiff there availed himself of the license to use the premises in their existing condition, and accepted it with

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its attendant perils. The defendant did no affirmative act at the time, by which existing conditions were changed and new perils created.

In the case of the movement of a train of cars over a track at a place which the public are permitted to use as a crossing, the company are necessarily apprised that it is attendant with danger to life. The company is an actor at the time in creating the circumstances which imperil human life, and it would be alarming doctrine that it was under no duty to exercise any care in the movement of its trains. The cases of *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525; and of *Sutton v. N. Y. C. & H. R. R. Co.*, 66 id. 243, do not sustain the defendant's contention. In neither of these cases was the movement of the cars the direct act of the party sought to be charged, but resulted from causes which could not reasonably or naturally have been anticipated. There was in fact no negligence shown on the part of the defendants. The court in these cases properly held that the circumstances did not create any duty toward the party injured, or tend to establish any culpable negligence.

The ground of liability in this case is negligence, and the duty of the defendant to exercise reasonable care existed irrespective of the fact whether the plaintiff's intestate had a fixed legal right to cross the track, or was there simply by the defendant's implied permission. The construction of the deed was not material in determining the question of reasonable care. The circumstances known to the defendant required this, whether the plaintiff's intestate was there by right or by a mere license. The judge, upon the defendant's request, charged that if the intestate was on the track by mere license of the defendant, and having no other right, the plaintiff could not recover. The learned judge, in making this charge, followed what he understood to be the ruling of the General Term on the first appeal, and the charge was, we think, for the reasons stated, erroneous. But the error was in favor of the defendant, and the jury, having found that the defendant was guilty of negligence in the management of the train which caused the intestate's death, this finding, if justified (in the absence of contributory negligence), sustains the action.

[Minor points omitted.]

We find no error of law in the record, and the judgment should therefore be affirmed.

Judgment affirmed.

All concur, except RUGER, C. J., dissenting.

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PEOPLE v. FIRE ASSOCIATION OF PHILADELPHIA.

(32 N. Y. 311.)

Constitutional law — regulation of foreign insurance companies.

A statute providing that insurance companies of other States, seeking to do business here, shall pay to the insurance department for taxes, etc., an amount equal to that exacted by "existing or future laws of such other States from companies of this State seeking to do business there," is not unconstitutional, although such amount may be greater than that required by other existing laws of this State. (*See note, p. 391.*)

ACTION for percentage upon insurance premiums. The opinion shows the point. The defendant had judgment below.

Leslie W. Russell, attorney-general, for appellant.

Joseph H. Choate, for respondent.

FINCH, J. The legislation of the State relating to foreign insurance companies is challenged on this appeal as a violation of constitutional right. The act of 1875 (chap. 60), in substance, provides that an insurance corporation of another State, seeking to do business here, shall pay to the superintendent of the insurance department for taxes, fines, penalties, certificates of authority, license fees and otherwise, an amount equal to that imposed by the State of its origin upon companies of this State seeking to do business there, when such amount charged is greater than our own. The evident purpose of the act is to treat the corporations of another State seeking to transact business here precisely as such other State should treat our own corporations seeking to do business there. It rests upon the idea that the comity due from one State to another is not required to be more than equal and reciprocal, and what is wholly a matter of privilege may be granted or withheld upon conditions.

This legislation is assailed, first, upon the ground that it is an unlawful delegation of the legislative power, and the General Term have so held upon the authority of *Barto v. Himrod*, 8 N. Y. 483. We do not think that case at all decisive of this. What was there denominated the school law came from the hands of the legislature, not as a law, but as a proposition. Whether it should be a law or

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not was precisely the question submitted to the popular vote. The legislature proposed the law, but left it to the people to enact. The process carried out and applied to all bills would have resulted in a complete abdication by the senate and assembly of their authority and functions. Instead of making laws they would simply have suggested them, reported them for consideration, but left the judgment upon them, the determination of their expediency and wisdom, to an authority outside of their own. As to the school law, the people were made the legislature, and left to decide whether the bill proposed should or not become a law. This court held that the legislature, under the Constitution, could not so delegate its power, but was bound to determine for itself the expediency of the measure, and either enact or reject it. But nothing in that decision denied to the legislature the right to pass a law whose operation might depend upon, or be affected by, a future contingency. The opinions expressly conceded the existence of such power. It was not denied that a valid statute may be passed, to take effect upon the happening of some future event, certain or uncertain. And this was said as to the character of such events, viz.: "The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the expediency of the law; an event on which the expediency of the law, in the judgment of the law-makers, depends. On this question of expediency the legislature must exercise its own judgment definitively and finally." The statute before us fully answers this description. It came from the hands of the legislature a complete and perfect law, having at once a binding force of its own, and dependent upon no additional consent or action for its vitality and existence. The question of expediency involved in it was not delegated to any other tribunal, but settled definitively and finally by the legislature itself. It determined, as a conclusion proper and expedient, that foreign insurance companies, as the price of admission to our territory, should pay in taxes, license fees, and the like, precisely what the States which created them should impose upon our companies in excess of our usual rates as the price of admission to the foreign territory. That was the whole question involved. Nothing else in the proposed law remained to be settled as expedient or otherwise, and that question the legislature determined for itself, upon its own reasons and its sole responsibility. Neither the law nor its expediency depended

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upon the legislation of another State. It remained the law and its expediency was the same, whether other States legislated or not. If they did, the contingency arose which the law stood ready to meet; if they did not, it remained none the less the law, although no fact occurred to set it in operation. This court has steadily declined to push the doctrine of *Barto v. Himrod* beyond the point which it decided. In *Bank of Rome v. Village of Rome*, 18 N. Y. 39, we sustained as constitutional an act conferring upon municipal authorities certain powers not to be exercised until the act had been approved by two-thirds of the tax payers. The distinction taken was that the law took effect immediately, and conferred the necessary power, but did not compel the village to act under it unless the tax payers so determined. The law was complete, although its operation depended upon a contingency, which might or might not happen. A similar distinction was taken in other cases. *Starin v. Town of Genoa*, 23 N. Y. 439; *Bank of Chenango v. Brown*, 26 id. 467; *Clarke v. City of Rochester*, 28 id. 605. While there were differences of opinion in these cases as to the precise grounds which distinguished them from *Barto v. Himrod*, there was an entire concurrence in the construction put upon the latter case, a construction which makes it inapplicable to the statute under consideration.

But it is argued that this act offends, although not in the same manner as the school law, by leaving the amount of the tax or fine to the legislative discretion of another State. The argument is, that the nature of the attempted legislation is vicious; that what the amount of a tax, fine, penalty or license shall be is essentially the direct and immediate effect of statutory enactment; that the act in question does not determine it; that it remits it to the legislature of another State by its enactments to create or change the tax. Authority for this criticism is found in a decision in Alabama (*Clark v. Port of Mobile*, 67 Ala. 217), and in one in Indiana (10. Ins. L. J. 361). But the whole argument rests on the single point that the amount of the tax or fine imposed is not definitely fixed by the terms of the statute, but depends above a certain rate upon foreign legislation. Is it true that a fine or tax cannot be imposed unless its amount be stated in the law? And that, if left to be determined by some other tribunal, thereby the legislative power has been delegated? Laws define a multitude of forbidden acts and impose fines and penalties not exceeding certain amounts, but

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below those amounts left wholly uncertain and committed to the discretion and judgment of judicial officers or tribunals. It is quite certain therefore that the legislature does not abdicate its functions and delegate its authority when it imposes a fine or penalty without itself fixing the amount, or when it leaves it to be fixed by some other tribunal. But in the statute before us nothing is left to anybody's discretion. That is certain which can be rendered certain, and the act fixes tax by reference to an extrinsic fact which determines its amount in excess of a fixed and established rate. Because that extrinsic fact is the legislation of another State, it does not follow that the legislative discretion of such other State is in any manner substituted for our own. The opinion in the case decided in Alabama turns upon what appears to us to be this error. It asserts that the law of which it speaks "authorizes in effect the legislature of Mississippi, speaking through its statutes, which are the subjects of extrinsic proof and not of judicial knowledge in our courts, to fix by law the amount which the treasurer of Alabama shall demand of appellants as a license tax to do business in this State." A similar inference from our own statute is pressed upon us in the case at bar. But if when our statute was passed, there had been in existence a law of Pennsylvania, imposing upon New York companies a license fee of three per cent, and because of that fact our legislature had enacted that all Pennsylvania companies should pay a license fee of three per cent, would that law have been a delegation of legislative authority to the State of Pennsylvania? Most clearly not, although the fact of the foreign law lay at the foundation of our legislative judgment and discretion. And if within a month, the foreign law changed the impost to four per cent, and our own legislature, again ascertaining the fact, and because of it, should change our tax to four per cent, would that be Pennsylvania legislation and not our own? And what would be certainly constitutional if done *seriatim*, by several and separate acts, does it become unconstitutional when the same precise and identical result, founded upon exactly the same legislative discretion, is accomplished by one? If so, a grave constitutional question is made to turn upon the bare form instead of the substance of legislative action. It seems to us that the whole difficulty arises from a failure to regard the foreign law, relatively to our own legislation, as simply and purely an extrinsic and contingent fact. Such fact, like any other, may justly influence and

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even occasion legislative action, without at all changing its nature, destroying its discretion or abridging its duties or its judgment. Most laws are made to meet future facts. They are complete when passed, but sleep until the contingency contemplated sets them in operation. A law which defines and punishes murder is none the less complete and authoritative although no murder be committed, and so the contingency it was framed to meet does not occur. Such contingency may sometimes be, instead of a certain and definite fact, one which is variable and changeable. The legislation suited to such a fact and adapted to such a future emergency may properly recognize its movable character, and be itself made flexible to the changing emergency, and this very characteristic is the product of legislative will and discretion rather than a surrender of it. If a foreign nation should impose upon American shipping onerous and severe harbor dues, with a view of crippling our commerce and gaining for itself our carrying trade, and because of this Congress should pass an act imposing upon the vessels of such nation coming into our ports such and the same harbor dues as by their laws should be at the time charged upon our shipping, the act would be one of retaliation ; deliberately intended to operate according to the measure of the foreign law, treated as an existing or contingent fact ; but could not be justly said to amount to an abdication by Congress of its legislative discretion and judgment.

Possibly we may get nearer to the ultimate point of the objection urged. That would seem to be that while the legislature might, by a series of separate acts, each passed because of a then existing foreign law, follow its changes, yet it cannot do so by one act which adopts and enacts such future and contingent mutations. This doctrine requires us to hold that a law, so framed as to follow and recognize the changes of foreign legislation, and thereby incorporate such changes into its own operation, is a delegation of the legislative power and therefore inadmissible. We have found no authority for such a broad and general proposition. What has been said upon the subject is to the contrary, except perhaps inferentially by the ruling in specific cases. In *State v. Parker*, 26 Vt. 365, the general subject was discussed and it was said : "If the operation of a law may fairly be made to depend upon a future contingency, then it makes no essential difference what is the nature of the contingency, so it be an equal and fair one, a moral and legal one, not opposed to sound policy, and so far connected with

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the object of the statute as not to be a mere idle and arbitrary one." And it was added: "One may find any number of cases, in the legislation of Congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries." How true this is, and how dangerous would be a denial of the power to legislate in such manne; may be made more apparent by examples. The non-intercourse acts of the three years beginning with 1809 were made in terms dependent upon the action of France and England toward this country, and were to be revived or revoked according to the course of the foreign law, the effect of which was to be determined by the president and declared by his proclamation. This instance is cited in *Bull v. Read*, 13 Gratt. 90, as a law depending upon an uncertain future contingency, and an objection taken in the Federal courts that the power of legislation was transferred to the president was disregarded. *Cargo of Brig Aurora v. United States*, 7 Cr. 386. In *Williams v. Bank of Michigan*, 7 Wend. 540, it appeared that by an ordinance of Congress, passed in 1787, the governor and judges of the north-western territory were authorized to adopt and publish in the district such laws of the original States, both civil and criminal, as might be necessary and best suited to the circumstances of the district. In 1805 Michigan was made a separate territory with a government "in all respects similar" to that provided for the north-western territory. Under this legislation it was held that the governor and judges of Michigan could legally incorporate a banking institution. The duty of making laws for the territory was saved only to the national legislature by its power of disapproval. Congress has legislative power over the formation and procedure of the Federal judiciary. It is provided (§ 914, U. S. R. S.) that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts shall conform as near as may be to those existing at the time in like causes in the courts of record of the State within which such Circuit and District Courts are held. And more specifically it is ordained that jurors to serve in the Federal courts shall have the same qualifications and be entitled to the same exemptions, and shall be designated by ballot, lot or otherwise, according to the mode of forming such juries then practiced in the State courts. Coming to our own legislation, we notice that affidavits taken

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in another State may be effectual here if taken before any officer authorized by the laws of such State to take affidavits. 3 R. S. [6th ed.] 657, § 27. A deed may be recorded or read in evidence in this State when made by a person residing without the State and in some other State or territory, if proved or acknowledged before any officer "authorized by the laws thereof" to take the proof and acknowledgment of deeds. 2 R. S. [6th ed.] 1140, § 5. And wills of personal estate, duly executed by persons residing out of this State, "according to the laws of the State or country in which the same were made," may be proved and established and become valid and effectual here. These illustrations are not strictly analogous, but they tend to show how a law may be made to fit a changing event, and follow it, and adjust itself to it, through a series of future mutations, and those too made by foreign legislation, or the voluntary action of other bodies; and they indicate also the dangers of forbidding such discretion. But it is said the doctrine thus asserted would permit one State to adopt the law of another State together with its future changes by one sweeping enactment; and for an example, that New York might enact that the rate of interest here for the loan of money should be such and the same as that which should be from time to time prescribed by the law of Maine. These are seeming, but in reality false analogies. They are pure cases of an abdication of its functions by the legislature and of an unwarranted delegation of its authority. But that is so because there is no dependent or causative connection between the domestic and the foreign law, as was said in *State v. Parker*, *supra*; and because, as was explained in *Barto v. Hinrod*, the event upon which the law is made to take effect is not one on which the expediency of the law in the judgment of the law-makers depends. In other words, no legislative judgment is involved. Perhaps we can test the distinction in another way. We may compare the law as to interest above mentioned, and the one before us, in respect to their capacity to be debated on the merits. The former would have no merits and could not be debated. The only discussion on its merits would be in Maine, and there it would be over its law, and that when enacted would become our law. The debate upon the expediency of the particular rate to be charged would be all there, and our legislature would form no judgment upon it and could not debate it. The only thing they could debate would be whether they should thus abdicate their own judgment

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and authority. But the law before us could be debated on the merits, and passed or rejected as the result of legislative judgment and discretion. On one side it could be argued that the proposed law was just and wise; that it gave needed protection to our own corporations going beyond our borders; that it aimed to produce equality of privilege; that unless the legislature remained in continual session the law must be adjusted to meet emergencies occurring during its recess; that the bill was framed to meet that emergency and was expedient on its own merits. On the other side it could be said that the measure would be inherently vicious because in the nature of retaliation; and a change might be made in the foreign State which we should be reluctant to follow. And to this the reply would come that as the tax involved did not touch or interfere with our general system of taxation, and was merely a license fee or price of admission to our jurisdiction, that it could properly be adjusted to the prices charged, and follow them whenever in excess of our established rates; and if such excess should be taken away entirely, precisely the good result arrived at would be accomplished; corporations would freely pass both borders, paying only the equal rates of ordinary and just taxation. There is thus developed the clear and wide difference between the two laws. One has merits of its own; the other has none. The expediency of one is debatable; that of the other is not. The one is enacted because of the foreign law; the other only according to the foreign law. The one is passed for legislative reasons and out of a legislative discretion which the foreign law and its possible mutations engender; the other without any such reasons and with no reason whatever, but only through trust in a foreign reason. It seems to us that the difference is plain and decisive. The law before us preserves our normal and ordinary rate of taxation in any event and operates only when the foreign rate rises above it, and cannot be justly held unconstitutional as involving a delegation of the legislative discretion. We should not so determine except in a very clear and certain case, and be careful not to restrain or hamper, without obvious necessity, the scope and range of the legislative authority. Legislation which retaliates is not inevitably vicious. It may sometimes be just, and often be necessary and even indispensable. In its inherent nature it is founded upon and adapts itself to the foreign law as a fact or contingency to be met. In any given instance it may be wise or unwise, but we are not ready to adopt a doctrine which denounces

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it as unconstitutional because it openly professes and declares itself to be precisely what it is, and fails to disguise itself in the form of separate acts following the mutations of the foreign law without confessing the fact. And that such legislation is not necessarily vicious, and may be in a given case entirely just and perfectly fair, will appear as we proceed to consider some further questions.

A second objection to the constitutionality of the act is founded upon article 14 of the Federal Constitution, and especially upon its final clause which commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The argument here takes a wide range, and touches upon questions of supreme and vital importance as to the relations of the States to each other, and of each to the United States. Corporations are claimed to be "persons" within the meaning and protection of the clause referred to; its force and operation is carried beyond the limit indicated by the emergency from which it sprang; and it is asserted to forbid unequal taxation and condemn such legislation as that under consideration. But we think these grave questions are not before us, and the clause relied upon has no application to the rights of the defendant. It is a corporation, organized and existing under the laws of Pennsylvania; a creature of those laws, and beyond their jurisdiction, carrying its corporate life and existence only by sufferance and upon an express or implied consent. It could not come within our jurisdiction, or transact business within our territory, except by our permission either express or implied. The right of a State to exclude foreign corporations is perfectly settled and not open to debate. *Paul v. Virginia*, 8 Wall. 168; *Bank of Augusta v. Earle*, 13 Pet. 586; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Co. of San Mateo v. S. P. R. Co.*, 13 Fed. Rep. 722, FIELD, J. Out of comity between the States has grown a right founded upon implied consent. Where a State does not forbid, or its public policy, as evidenced by its statutes, is not infringed, a foreign corporation may transact business within its boundaries and be entitled to the protection of its laws. But this right is still founded upon consent which is implied from comity and the absence of prohibition. But a State may prohibit. This State did prohibit and has steadily continued to prohibit the transaction of business within its limits by foreign fire insurance companies except upon certain express terms and conditions. By the act of 1853 as amended (2 R

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S. 5th ed. 762, § 54), fire insurance companies incorporated by any other State were forbidden "directly or indirectly to take risks or transact any business of insurance in this State," unless upon compliance with certain specified conditions. In 1871 (chap. 388, § 5) the prohibition was repeated except upon the fulfillment of all the requirements of the laws then in force together with those named in that act. The law now under consideration was then in force, having been passed in 1865 (chap. 694). The amendment of 1875 simply added a provision authorizing the superintendent to remit certain fees and charges. The situation then is this: The State, having the power to exclude foreign corporations, determines to do so unless they will submit to certain conditions. It meets the applicant on the border, forbidding admission, as it has a right to do, except on condition that it will fulfill all the requirements of our statutes relating to foreign corporations, one of which is the very law here assailed. When the corporation comes in it agrees to the conditions. They become binding by its assent. The tax or license fee charged by the act of 1865 is one of these conditions. It is imposed as the price of permission to come within the jurisdiction, and not as a tax upon one already within the jurisdiction. The fourteenth amendment therefore has no application. It can apply to foreign insurance companies only after they have performed the conditions upon which they are entitled to admission. Any other view of the case involves this absurdity: that the foreign company may agree to pay the tax charged by the act of 1865 so as to get within our jurisdiction, and then refuse to pay it while insisting upon the right to remain. It cannot agree to conditions as the price of admission, and after having been admitted turn around and dispute them. Even if the conditions were unconstitutional, which cannot be said of the terms of the act of 1865, considered as conditions, the foreign company could waive the objection (*Embury v. Connor*, 3 N. Y. 511; *Sherman v. McKeon*, 38 id. 267; *Phyfe v. Eimer*, 45 id. 103); and does so when it accepts the conditions by coming in under them, and is estopped from raising the question. *Voss v. Cockcroft*, 44 N. Y. 415. Even where the condition was a violation of the Federal Constitution, and the Supreme Court of the United States so declared, they refused to prevent the State from excluding the offending company and revoking its license. *Doyle v. Continental Ins. Co.*, 94 U. S. 535. By that process, even in such a case, obedience could be compelled, at

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the peril of removal from the State. But in the case before us the condition imposed is not a violation of the Federal Constitution upon any construction of the final clause of the fourteenth article, for that relates wholly to persons within the jurisdiction, already there in fact and of right, and their treatment thereafter, and not at all to the terms and conditions on which alone they can come in. This view of the case renders of no importance the argument founded on the word "tax," and the distinction sought to be drawn between that and the license fee. Grant that it is properly denominated a tax, yet the payment of a specific tax may be imposed as a condition of assent to fire insurance within the State, and as we have seen, has been so imposed by express and positive law. Its nature as a condition precedent is not altered by its name. The constitutional difference between the rights of non-resident individuals and foreign corporations is fundamental and apparent. The citizen of another State has a constitutional right to come within our jurisdiction. The charter of the nation has secured him that right, and we cannot exclude him nor clog his right with conditions, unless in exceptional cases under the police power. But foreign corporations, artificial beings, the product of a law not our own, have no constitutional right to pass their own borders and come into ours. The Federal Constitution has neither granted nor secured any such right. We may exclude absolutely, and in that power is involved the right to admit upon such conditions as we please. Until they are within our jurisdiction, the final clause of article 14, by its own terms, does not apply. While they stand at the door bargaining for the right to come within, they might decline to come, but cannot question our conditions if they do. How then is the legislation vicious which proposes to treat them precisely as their own State treats our corporations similarly situated? Is exact equality unfair? Must comity become magnanimity or injustice? If we owe courtesy to sister States, do we not also owe protection to our own corporations, formed and fostered under our law? Is it vicious to insist for them upon precise equality of treatment? These questions our legislature answered. The inquiry was within the just range of their discretion. This court at least is bound to assume, and finds no difficulty in assuming, that they answered it wisely and justly.

[Minor considerations omitted.]

The judgment of the General Term should be reversed and judg-

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ment entered for the plaintiffs, for \$1,848.45, with interest from January 15, 1882, with costs.

Judgment accordingly.

All concur.

NOTE BY THE REPORTER.—In *Phoenix Ins. Co. v. Welch*, 29 Kans. 672, the court said: "The single question in this case is as to the constitutionality of what is known as the retaliatory section of our insurance law. That section reads as follows:

"Whenever the existing or future laws of any other State or government shall require insurance companies organized under the laws of this State, applying to do business by agencies in such other State or government, or of the agents thereof, any deposit or security in such State for the protection of policy-holders therein, or otherwise; or any payment for taxes, fines, penalties, certificates of authority, licenses, fees or otherwise, greater than the amount required for such purposes from insurance companies of other States by the then existing laws of this State, then and in every case, all companies of such State or governments, establishing agencies in this State, shall make the same deposit, for a like purpose, with the superintendent of insurance of this State, and pay to said superintendent for taxes, fines, penalties, certificates of authority, licenses, fees or otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such other State or government upon the companies of this State and the agents thereof. All insurance companies, partnerships and associations organized under any foreign government engaged in the transaction of the business of insurance in this State, as provided for in this act, shall annually, on or before the first day of March in each year, pay to the superintendent of insurance two per cent on all premiums received in cash or otherwise by their attorneys or agents in this State, during the year ending on the preceding 31st of December; which sum shall be paid, in addition to the other license fees, into the State treasury for the insurance fund. In case of neglect or refusal by any company to pay said sum, the superintendent of insurance shall revoke the license or authority granted such company."

"Its unconstitutionality is claimed upon two general propositions:

"First, that its validity depends upon the legislation of some other State, and that it is therefore not in and of itself a complete expression of the legislative will. Thus it makes the law of this State determined, not by what the legislature itself says, but by the varying enactments of other States. Second, it conflicts with the principle of equality of taxation required by § 1, of article 11 of the State Constitution."

"Much discussion has prevailed as to the question how far a law must be complete when it passes from legislative action. In *Barto v. Himrod*, 8 N. Y. 483, it appeared that the legislature of New York passed an act establishing free schools, which provided that the electors should determine by ballot at the ensuing annual election whether such act should become a law or not, and it was held that such act was unconstitutional and void. The reason given was, that by the Constitution the legislature is made the sole depository of legislative power; that it must of itself determine absolutely and finally whether any proposed measure shall or shall not become a law, and that it cannot delegate such determination to any other officer, tribunal or body. This doctrine has been followed in many cases, and is invoked here to avoid the section in dispute. It is argued that our legislature did not finally and absolutely determine what burden, whether it be called a tax or a license, shall be imposed upon the plaintiff as a condition of doing business in this State, but has left the matter open to the determination of the legislature of the State of New York. This subject is discussed by Cooley in his *Constitutional Limitations*, p. 117 and following, and the cases thereon cited in the notes. We do not deem it necessary to enter into a full discussion of the question, or determine whether as to a similar statute the ruling in *Barto v. Himrod* should be followed. All that we deem necessary to decide is, that the legislature may constitutionally pass a law whose operation is made to depend upon some contingency, and that the contingency named in this section is not such as to vitiate it. This distinction is indicated by the court in its opinion in the case of *Santo v. State*, 2 Iowa. 203, in these words:

"Now if the people are to say whether or not an act shall become a law, they become

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or are put in the place of the lawmaker. And here is the constitutional objection: their will is not a contingency upon which certain things are or are not to be done under the law, but it becomes the determining power whether such shall be the law or not.

"Now in this section is absolutely and finally prescribed the rule and measure of license. It is not left to the State superintendent to determine what the rule shall be. His duty is simply to ascertain the facts, and apply the rule. He may not arbitrarily determine upon what conditions the plaintiff may enter this State; he can only enforce the condition which the legislature has imposed. It is true the extent of those conditions may vary in different cases, but the rule to determine the variance is not left to his judgment, but is prescribed by the legislature. Our laws abound in cases in which a statute is made dependent upon the action of some tribunal or body, or upon some other contingency, and is therefore practically dormant until such action takes place or contingency happens. The laws authorizing municipalities to issue bonds are instances. They are almost universally made to depend upon the vote of the people of the municipality. And until and unless such vote is had, the law is practically dormant. Of a similar nature are the hedge-bounty laws, the herd laws, many of the statutes for the regulation of municipal governments and others which might be named. This section, it is true, provides that in certain contingencies higher burdens may be imposed upon some foreign insurance companies than upon others, but it defines the contingencies and prescribes the rule for fixing such higher burdens.

"But it is said that the contingency is the action of the legislature of a foreign State—that in effect the section attempts to transfer the law of such foreign State to our own, and make it operative within our territorial limits. Not so; the section is the law of Kansas, enforced solely within our limits, and in enforcing it the superintendent is only obeying the mandate of our legislature. True the contingency is created by the action of a foreign State, and the section refers the superintendent to the legislation of that State to determine whether the contingency has arrived. But this is not the only instance in which our legislation refers to that of other States, and in a certain sense makes that legislation of force here. As is well said by the Supreme Court of Illinois in a recent case decided by it, a case which is exactly in point with this, and in which the conclusion of that court accords with our own—the case of *Home Ins. Co. v. Swigert*: 'Who has ever doubted the validity of that portion of our statute which declares that deeds executed without the State may be acknowledged before any one authorized to take such acknowledgments, by the laws of the State or country in which they are made? Or who has ever questioned the constitutionality of that provision of our statute which makes all wills and testaments made in a foreign State or country binding and valid here, if executed and proven agreeably to the laws and usages of such foreign State or country, although not in accordance with our general law on the subject? And yet in either of these cases there is just as much reason for claiming that our legislature has abdicated its legislative functions, and attempted to delegate its constitutional and legitimate powers to a foreign State or country, as there is that it has done, or is attempting to do so, in the present case.'

"See also what is said by Chief Justice REDFIELD, in *State v. Parker*, 26 Vt. 357: 'one may find any number of cases in the legislation of Congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries. In some, perhaps, these laws are made by representative bodies, or it may be by the people of these States, and in others by the lords of the treasury or the board of trade, or by the proclamation of the sovereign; and in all these cases no question can be made of the perfect legality of our acts of Congress being made dependent upon such contingencies. It is in fact the only possible mode of meeting them, unless Congress is kept constantly in session. The same is true of acts of Congress by which power is vested in the president to levy troops, or draw money from the public treasury, upon the contingency of a declaration or an act of war committed by some foreign State, empire, kingdom, prince or potentate.'

"In all these cases it is the law of the home government which is enforced, and the action of the foreign government only makes the contingency upon which the law becomes operative. There is no difference in principle between such contingency and any other which may be provided for in the statute. In all such cases it is the duty of the officer charged with the execution of the law to inquire as to the facts, and ascertain whether

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the contingency named has arrived, and if so to enforce the mandate of his superior, the legislature. We think therefore that the section is not obnoxious to the charge of unconstitutionality on this ground."

HORROR, C. J., dissented.

SMITH V. CITY OF ROCHESTER.

(22 N. Y. 463.)

Water and water-course — diversion of small navigable inland lake.

The plaintiffs owned and operated mills on a fresh and non-navigable creek, fed by the surplus waters of three small inland lakes, one of which was navigable, and navigated for local purposes by those who dwelt on its shores. All the premises in question were originally ceded by this State to Massachusetts by the treaty of 1786. The defendant, under recent legislative authority, constructed a conduit from the latter lake to supply the city, drawing 4,000,000 gallons of water daily. *Held*, that such diversion, being injurious to the defendant, may be enjoined, and the defendant must respond for the injury.

ACTION to restrain diversion of water. The opinion states the case. The defendant had judgment below.

Theodore Bacon, for appellants.

William F. Cogswell, for respondent.

RUGER, C. J. The State, by virtue of its sovereignty, is deemed the original grantor of all titles to real estate, and a conveyance by it of riparian rights upon non-navigable streams vests its guarantees, both mediate and remote, with all the rights which such owners can acquire against any grantor.

The riparian owners of land adjoining fresh-water, non-navigable streams, take title "*ad usque filum aquæ*," to the thread of the stream, and thereby acquire the right as incident to such title to the usufructuary enjoyment of the undiminished and undisturbed flow of such water. "Fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent" is the expressive language of the common law, and is of universal application. *Clinton v. Myers*, 46 N. Y. 511; s. c., 7 Am. Rep. 373; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; s. c., 38 Am. Rep. 407.

The plaintiffs have shown title to the several premises occupied and enjoyed by them as mill-owners upon the banks of a non-navigable stream, which entitles them to the uninterrupted flow of its waters in the channel of the stream contiguous to their respective premises as it had been accustomed to flow. *Gardner v. Vil. of Newburgh*, 2 Johns. Ch. 162; 7 Am. Dec. 526; *Roid v. Gifford*, Hopk. 416; *Brown v. Bowen*, 30 N. Y. 519; *Pixley v. Clark*, 35 id. 520; *Varick v. Smith*, 5 Paige, 137; 28 Am. Dec. 417. The right to maintain an action to restrain the infringement of any rights of property which they possess as riparian owners is unquestionable. *Gardner v. Vil. of Newburgh*, *supra*; *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191. *The West Point Iron Co. v. Reymert*, 45 id. 703; *Garwood v. N. Y. C. & H. R. R. Co.*, 83 id. 404; *Yates v. Milwaukee*, 10 Wall. 504.

Honeoye creek, upon which the mill privileges of the several plaintiffs are situated, is a fresh-water, non-navigable stream, formed by the junction of the surplus waters of the Hemlock, Canadice and Honeoye lakes flowing through their respective outlets, and affords valuable water privileges, which have been used and enjoyed by the respective owners of lands on the creek for a long series of years. It is not claimed that the creek was ever made a public highway, or that it is capable of navigation, neither is it denied that the riparian proprietors own the bed of the stream. It necessarily follows that such owners possess all the rights in the running water of this stream that belong to the riparian owners of any stream or water-course.

This action is brought to restrain the continued diversion by the defendant of the surplus water of Hemlock lake from this creek, such diversion being effected by means of a conduit constructed by the city of Rochester from the lake to the city, and which now draws from the lake 4,000,000 gallons of water, and has the capacity for carrying upward of 9,000,000 gallons daily. The conduit was constructed about the year 1875 for the purpose of furnishing for the use of the citizens of Rochester a supply of water for domestic and other purposes, and was authorized by chapter 754 of the Laws of 1873.

The defense proceeds upon the theory that Hemlock lake, being a navigable body of water, as such, with its bed, belongs to the State, and that the State possessed the consequent right of authorizing the appropriation of the water by its agents or grantees for

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any public use, without regard to the rights of individuals who may have previously acquired proprietary interests therein.

The proofs and the finding of the court below establish that this lake was to a certain extent navigable, and that for many years it had in a limited way and for local purposes been actually navigated by those living upon its shores. It was a small inland lake, about seven miles in length and one-half mile in width, lying about thirty miles south-easterly from Rochester. It may be assumed, then, that this lake formed a portion of the navigable waters of the State, and was therefore subject to all of the rules pertaining to such waters, and further, that the State conferred upon the defendant all of the rights in the lake which remained in it, subsequent to the original grant of the lands on Honeoye creek. Section 3 of chapter 754 of the Laws of 1873, under authority of which said conduit was built, reads as follows: "The board of water commissioners of the city of Rochester appointed under the provisions of act chapter 387 of the Laws of 1872 are hereby authorized to enter upon, control and use as the agents of the city of Rochester the waters of Hemlock and Canadice lakes, situated in the county of Livingston, for the purpose of procuring a water supply for the said city of Rochester, and shall also have the power to raise the surface of water in said lakes, not to exceed two feet, and to draw down the said water below low-water mark, not to exceed eight feet; also the right to take such measures and make such constructions as shall be necessary to secure said waters for the purposes intended." "All of the above powers hereby granted to be exercised with due regard to the rights of owners of property adjacent thereto and dependent thereon. And the city of Rochester shall be liable to pay to such owners any and all damages which may be caused to such property by the performance of said act or the exercise of the powers hereby granted." This act does not infringe any constitutional provision and was enacted in substantial conformity with the requirements of the fundamental law.

The provision quoted undoubtedly grants to the city of Rochester the right to make such use of the waters of the lake as the State itself might have made, and imposes with it the same liability to those who might be injured by its use of such waters as the State itself would have incurred for a similar use.

It seemed to be assumed upon the argument that the rights of the State in the waters of Hemlock lake depended upon the owner-

ship of the soil under its bed, and the question whether the title of riparian owners by the rules of common law included the land to the center of the bed of the adjoining navigable body, or was restricted to the water's edge. We do not think this is necessarily so, but conceding the claim for the present, let us examine that position. This question has occasioned some diversity of opinion in this country and has led to conflicting and apparently irreconcilable decisions in our courts. It would be a vain and useless effort to attempt to harmonize the divergent views on the subject, but we believe that a doctrine may be evolved from the authorities which will accord with the great weight of judicial opinion in this country, and still preserve such property rights as have been acquired and have grown up under the authority of diverse decisions. We have arrived at the conclusion that all rights of property to the soil under the waters of Hemlock lake were acquired by and belong to its riparian owners, while such rights only over its waters belong to the State as pertain to sovereignty alone.

The ownership and jurisdiction over the lands in the south-western part of the State in which Hemlock lake is located were, in the earlier history of this country, the subject of much controversy between the sovereign States of Massachusetts and New York. These differences were finally adjusted by a treaty executed between the respective States, in December, 1786, whereby the State of New York did "cede, grant, release and confirm to the said Commonwealth of Massachusetts, and to the use of the Commonwealth, their grantees and the heirs and assignees of such grantees forever, the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property (the right and title of government sovereignty and jurisdiction excepted), which the State of New York hath, of, in or to" the lands in question; on the other hand, the State of Massachusetts ceded to New York all claim to the government, sovereignty and jurisdiction of the lands described.

Subsequent to this treaty there remained in the State of New York only such rights of property in these lands as necessarily pertained to its sovereignty and were inalienable by the sovereign. All such rights of property in or to the territory in dispute as could by the most comprehensive and absolute conveyance be granted to another were, by this treaty, conferred upon the Commonwealth of Massachusetts and its grantees. *Burbank v. Fay*, 65 N. Y. 57;

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Comm'rs of Canal Fund v. Kempshall, 26 Wend. 404. The settlers in this territory derive the title to their lands from the Commonwealth of Massachusetts and have become possessed of all of the rights which that State acquired in such lands by virtue of the treaty of cession or otherwise.

It now remains to consider the nature of the rights of property which pertain exclusively to sovereignty and which do not pass to the grantee under a conveyance of the soil bordering upon and adjoining fresh-water navigable lakes and rivers. It may be premised that the mere right of eminent domain always and from necessity resides in the sovereign. It is declared by statute that the State, by virtue of its sovereignty, is deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State. 3 R. S. (7th ed.) 2162, § 1; *People v. Fulton F. Ins. Co.*, 25 Wend. 219; *People v. Denison*, 17 id. 312; *De Peyster v. Michael*, 6 N. Y. 467; *People v. Van Rensselaer*, 9 id. 319. This right confers upon the State the title to such property as may be forfeited or escheated, or the title to which for any reason fails, and also the right to resume the ownership and possession of such property as may be required or rendered necessary for public purposes. *Varick v. Smith*, 5 Paige, 143, 159; *Matter of Albany St.*, 11 Wend. 149; 25 Am. Dec. 618; *Morgan v. King*, 35 N. Y. 454. Among other rights which pertain to sovereignty is that of using, regulating and controlling for special purposes the waters of all navigable lakes or streams, whether fresh or salt, and without regard to the ownership of the soil beneath the water. This right is known as the *jus publici* and is deemed to be inalienable.

Judge EDMONDS, in his learned opinion in *Gould v. Hudson River Railroad Co.*, 6 N. Y. 546, says: "When regarding the rights of the State in respect to lands, we must not be unmindful that it has two interests, one governmental and the other proprietary. Or as it is divided by M. Prudhon in his *Traité du Domain Public*, the public domain, which is that kind of property which the government holds as mere trustee for the use of the public, such as public highways, navigable rivers, salt springs, etc., and which are not of course alienable; and the domain of the State, which applies only to things in which the State has the same absolute property as an individual would have in like cases." Although this quotation is from a dissenting opinion, yet so far as the principle announced is concerned, it met with no dissent and is supported by

universal authority. 6 N. Y. 555 ; *U. S. Bk. v. Bk. of Metropolis*, 15 Pet. 387 ; *Doe dem. Knight v. Nepean*, 5 B. & A. 91 ; *Hoyt v. Sprague*, 12 Pick. 407 ; 3 Kent Com. 537 ; *Pollard's Lessee v. Hagan*, 3 How. 222.

In the examination of any of the numerous questions relating to water-courses that may arise, no discussion would be complete which failed to refer to the ancient and learned treatise *De jure Maris*, by Sir Matthew Hale, and which, after the lapse of two centuries, remains the most concise, comprehensive and reliable work on the subject of which it treats. As appears from the learned note of Judge COWEN to *Ex parte Jennings*, 6 Cow. 537, under the following title "Of the right of prerogative in private or fresh rivers," it reads : "The king, by an ancient right of prerogative, hath had a certain interest in many fresh rivers, even where the sea does not flow or reflow, as well as salt or arms of the sea, and those are these which follow :

"1st. A right of franchise or privilege that no man may set up a common ferry for all passengers, without prescription time out of mind or a charter from the king.

"2d. An interest as I may call it of pleasure or recreation.

"3d. An interest of jurisdiction.

"And another part of the king's jurisdiction in reformation of nuisances is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and greater vessels, but also of smaller, as barges and boats, to reform the obstructions or annoyances that are therein to such common passage, for as the common highways on the land are for the common-land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water, and as the highways by land are called *altæ viæ regię*, so these public rivers for public passage are called *fluvies regales* and *streomes le Roy*, not in reference to the propriety of the river but to the public use."

The doctrines of this treatise so far as relate to the jurisdiction of the sovereign over navigable waters have been frequently cited with approval in our reports and are now indisputable. *People v. Platt*, 17 Johns. 210 ; 8 Am. Dec. 282 ; *Hooker v. Cummings*, 20 id. 100 ; 11 Am. Dec. 249 ; *Commissioners v. Kempshall*, *supra* ; *Canal Appraisers v. People*, 17 Wend. 570.

The rule of common law is concisely stated in the note above referred to as follows : "Rivers not navigable, that is, fresh rivers

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of what kind soever, do of common right belong to the owners of the soil adjacent to the extent of their land in length. But salt rivers, where the tide ebbs and flows, belong of common right to the State. That this ownership of the citizen is of the whole river, viz., the soil and the water of the river, except that in his river where boats, rafts, etc., may be floated to market, the public have a right of way or easement."

It may however be stated in passing, that it is generally conceded that this doctrine is inapplicable to the vast fresh-water lakes or inland seas of this country or the streams forming the boundary line of States. *Canal Commissioners v. People*, 5 Wend. 446; *Tibbells case, supra*. Whatever conclusion may therefore be reached with reference to the ownership of the bed of Hemlock lake, it still remains that the State had certain rights in its waters, and so far as the same were alienable the defendant has succeeded to them. It may also be affirmed that if the term "navigable water" as used in England was ever there for any purpose wholly restricted to the waters which were affected by the ebb and flow of the tide, it has by common consent a more enlarged signification in this country, and is here held to mean all such waters as are actually navigable, whether fresh or salt. When it is considered that the rights and interests of the public, such as fishing, ferrying and transportation, are preserved in all navigable waters by the inherent and inalienable attributes of the sovereign, it would seem to follow that the controversies which have arisen over the nominal ownership of the soil under such waters have been magnified beyond the real interests involved. This becomes still more apparent when we consider the character and extent of the property which may in the nature of things be acquired and enjoyed in running water. "*Aqua curret debet currere.*" Neither sovereign nor subject can have any greater than a usufructuary right therein, and even this is subject to the temporary enjoyment by the riparian proprietors over whose lands it passes while on its way to its final destination, undiverted and undiminished, save for domestic or manufacturing purposes. 3 Kent Com. 439; *Tyler v. Wilkinson*, 4 Mason, 397. Thus all land covered by running water is subject to a servitude, either dominant or servient, and all interest in such water is simply an easement, incapable of fixed appropriation or conversion. 1 Stephens Bl. Com. 169; Wash. on Easement, 200. The rule of the common law of England has been uniformly deemed to apply in this country to the

affluents of all navigable waters as well as to all those which are non-navigable, and the only serious controversy arises over its application to its inferior fresh-water navigable streams and lakes. These rules were made the fundamental law of this State by its original Constitution and have been readopted upon every subsequent revision of that instrument.

Section 25 of the Constitution of 1877 reads: "And this convention in the name and by the authority of the good people of this State ordain, determine and declare that such parts of the common law of England and of the statute law of England and Great Britain and of the acts of the legislature of the colony of New York as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand eight hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall from time to time make concerning the same." § 13, art. 7, Const. of 1821 ; § 17, art. 1, Laws of 1846.

It is not claimed that the legislature has ever changed or modified the common-law rules on the subject under consideration by express legislation or direct action looking to their limitation. The only grounds for a denial of their application to the subject in this country is on account of their alleged inapplicability to the larger bodies of water possessed by our people, and the action of the legislature in assuming the ownership of the lands under the waters of the Mohawk and the Hudson rivers above tide water. DAVIES, J., opinion, *People v. Canal App.*, 33 N. Y. 478.

Peculiar reasons have governed the action of the State as to the lands under the Mohawk and Hudson rivers as we shall see hereafter. We do not think the reasons given justify the court in disregarding the positive requirements of the fundamental law to the extent claimed by some of the cases. In addition to the apparently conclusive force of the constitutional provision, we also think the decided preponderance of judicial authority in the State favors the application of the common-law rule to the navigable waters of this State. It would be unprofitable to go into an extended discussion or citation of the numerous cases treating of this question, and therefore but few of them will be referred to and those only in our State which illustrate the views commending themselves most strongly to our judgment. *People v. Platt*, 17 Johns. 195; *Hooker v. Cummings*, 20 id. 90; *Rogers v. Jones*, 1 Wend. 237; 19 Am.

Dec. 493; *Commissioners v. Kempshall*, 26 Wend. 404; *Ex parte Jennings*, 6 Cow. 518; *Gould v. H. R. R. Co.*, 6 N.Y. 522; *Trustees of Brookhaven v. Strong*, 60 id. 56; *Chenango Bridge Co. v. Paige*, 83 id. 178; s. c., 38 Am. Rep. 407. These decisions show a course of authority extending from an early period of our history to the most recent times, and although they do not constitute an unbroken chain, yet they are fortified by a wealth of learning, reason and illustration that render them irresistible as authority.

We can hardly omit to refer particularly to the learned note by Judge COWEN in *Ex parte Jennings*, the opinion of Judge EDWARDS in *Gould v. H. R. R. Co.*, and that of Senator VERPLANCK in the *Kempshall* case. Neither is it deemed necessary to refer to all of the cases which apparently sustain conflicting views upon this question. These cases nearly all relate to the river Hudson above tide water and to the Mohawk, and the remarks made with reference to one therefore apply to all. Undoubtedly the leading case on that side in our courts is *People v. Canal App.*, 33 N. Y. 461, in which the late Judge DAVIES delivered a learned and elaborate opinion. The head-note shows precisely the questions there involved and the extent of the doctrine announced: "The Mohawk river is a navigable stream, and the title to the bed of the river is in the people of the State. Riparian owners along the stream are not entitled to damages for any diversion or use of the waters of the Mohawk by the State."

It will be observed that the case relates to the Mohawk river and an appropriation of its water for the purpose of navigation alone—that being one of the uses which universally pertain to the rights of the sovereign in all navigable streams. The case is not therefore an authority for the appropriation of navigable waters for other public uses. We think this and similar cases might properly have been decided for reasons peculiar to the Mohawk and Hudson rivers upon the grounds stated in the *Commissioners v. Kempshall*, *supra*, by Senator VERPLANCK and by the chancellor and Senator BEARDSLEY in *Canal Appraisers v. People*, 17 Wend. 572. The titles granted to the original settlers in the Hudson and Mohawk valleys, as construed by the rules of the civil law prevailing in the Netherlands, from whose government they were derived, did not convey to their riparian owners the banks or beds of navigable streams. Upon the surrender of this territory the guaranty assured by the English authorities to its inhabitants of the peaceable

enjoyment of their possessions simply confirmed the right already possessed, and the beds of navigable streams, never having been conveyed, became, by virtue of the right of eminent domain, vested in the English government as ungranted lands, and the State of New York, as a consequence of the Revolution, succeeded to the rights of the mother country.

As to the lands under these rivers, the people of this State have, from the earliest times, asserted their title, however acquired, and have assumed to grant and convey them like other unappropriated lands belonging to the State. 3 Greenl. Laws, 13 (Dec. 1792); *Palmer v. Mulligan*, 3 Caines, 308; 2 Am. Dec. 270. It is stated in *People v. Canal Appraisers, supra*, that when the possession of these waters subsequently became necessary to the State for the purposes of navigation, they reacquired the rights formerly granted by them from the Western Inland Navigation Company by purchase, and they then appropriated them by virtue of their original proprietorship. We think the authority of these cases should be confined to the waters of the Hudson and Mohawk rivers, rights in which were alone necessarily involved in their determination. However this may be, we are clearly of the opinion that Hemlock lake is not such a body of water as under any rule entitles the State to claim the ownership of its bed, and that the only rights, if any, which the defendant acquired by virtue of chapter 754 of the Laws of 1873 were those which the State possessed by virtue of its sovereignty over the territory in question. Those rights are quite distinct from such as the State would have possessed as a riparian owner. Such rights would have entitled her to the same uses and subject to the same liabilities as other owners of property. *People v. Vanderbilt*, 26 N. Y. 292; *Commissioners v. Kempshall, supra*. We have before seen that the sovereign right grew out of and was based upon the public benefits in promoting trade and commerce, supposed to be derived from keeping open navigable bodies of water as public highways for the common use of the people.

We have also seen that they constituted an easement over the lands of the riparian owners for limited purposes, and embracing no right to convert the waters to any other uses than those for which the easement was created. It is an elementary principle that all easements are limited to the very purpose for which they were created, and their enjoyment cannot be extended by implication. This right, being founded upon the public benefit supposed

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to be derived from their use as a highway, cannot be extended to a different purpose inconsistent with its original use. The diversion of these waters for the purposes of furnishing the inhabitants of a large city with that element for domestic uses, and especially to lease them for manufacturing and other purposes, is an object totally inconsistent with their use as a public highway or the common right of all the people to their benefits.

We concede that such a use is a public one in the sense that enables a municipal corporation to procure the lawful condemnation of property for that object, but we deny that it is consistent with the purpose upon which the sovereign right is based.

The exercise by a ruler of the right of eminent domain is always subject to the obligation of making compensation for the property taken. *Gould v. Hudson River R.*, *supra*. Due regard for the distinctions existing between a public right and a public use, and also those between a sovereign and a proprietary right is essential to a just consideration of the rights of parties in navigable water-courses. While a sovereign may convey its proprietary rights, it cannot alienate its control over navigable waters without abdicating its sovereignty. *Martin v. Wuddell*, 16 Peters, 367. A neglect to observe these distinctions has been the cause of much error in treating of these rights.

In *Commissioners v. Kempshall*, Senator VERPLANCK says: "I cannot assent to the position that the conceded common-law authority of the State over such rivers, for the purposes of navigation, comprehends the right to divert the waters to other purposes of artificial navigation, wholly distinct from that of the river itself." He then proceeds to state rules in apt and pertinent language, which we consider decisive of this case in its various aspects. "The proprietor of the bed and bank of the stream has himself no absolute property in the waters, but strictly a usufructuary interest appurtenant to his freehold. He can use the waters for his own benefit; but he may not divert them to the injury of his neighbors, or lessen their quantity, or detain them unreasonably. If such be the strict limitation of the proprietary right, can it be that the State, as the trustee of a special public servitude, has a much less restricted right, and can divert or detain the waters for other uses? By its sovereign right of eminent domain, it undoubtedly may do so," * * * "but all these exercises of sovereign authority are alike 'the taking of private property for public use,' which the

Constitution pronounces may not be done ' without just compensation. ' "

It is said by the court in *Ex parte Jennings*, that " individual property cannot be taken, or which is the same thing, individual rights impaired for the benefit of the public without just compensation."

" The public right is one of passage and nothing more, as in a common highway. It is called by the cases an easement, and the proprietor of the adjoining land has a right to use the land and water of the river in any way not inconsistent with this easement. If he make any erection rendering the passage of boats, etc., inconvenient or unsafe, he is guilty of a nuisance, and this is the only restriction which the law imposes upon him. It follows that neither the State nor any individual have a right to divert the stream, or render it less useful or valuable to the owner of the soil."

It was also said by Judge EARL in the *Chenango Bridge* case, *supra* : " The legislature, except under the power of eminent domain, upon making compensation can interfere with such streams only for the purpose of regulating, preserving and protecting the public easement. Further than that it has no more power over the fresh-water streams than over other private property." See also *Morgan v. King*, 35 N. Y. 457; *Hooker v. Cumminys*, 20 Johns. 99; *Gardner v. Village of Newburgh*, *supra*.

The case of *Gould v. Hudson River R. Co.*, 6 N. Y. 522, has been cited as holding a contrary doctrine, but we do not so regard it. The question there related solely to the ownership of the lands between low and high-water mark on the Hudson river. This was at the point in dispute, a tidal river, and by the conceded doctrine of the common law the titles of its riparian owners were bounded by the line of high-water mark. The property there taken for a public use was acquired from the State, who was its lawful owner. See *Gould* case, 539.

The case of *People v. Tibbets*, 19 N. Y. 527, also involved the rights of riparian owners upon the Hudson river, and was put upon the express ground that by the common law the State was the owner of the bed and waters of that stream so far as the tide ebbcd and flowed.

These cases therefore cannot be considered as authority upon the question here presented. We are therefore of the opinion not only that the State had no right to grant to the city of Rochester the use of the waters of Hemlock lake, to the detriment of the riparian owners upon the banks of the stream formed by its outlet,

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but that their rights were recognized and provided for by the act under which the defendant assumes to justify its acts.

Evidence was given to support the theory that the improvements made by the defendant in the outlets of Canadice and Hemlock lakes furnished a more uniform and constant supply of water to the plaintiff's mills than before existed. It was claimed from this fact that they were therefore uninjured by the alleged diversion of water. No express finding upon this issue was made by the court below, and no grounds for its consideration here are now presented. The evidence upon the issue was conflicting, and we have no means of determining the question of fact involved.

Upon proceedings being taken to condemn this property by the city of Rochester, such a consideration would have great weight in determining the extent of the injuries to the plaintiffs' property occasioned by an unlawful interference with their water privileges, and it might bear also upon the question of the propriety of an injunction herein, but it is altogether, in its present aspect, a question for the consideration of the court below.

The evidence in this case tended to show that the plaintiffs were injured by the act of the defendant in diverting the water of Honoye creek, which had theretofore been accustomed to flow in its channel to the benefit of the mill-owners on that stream. This court must assume that some damage occurred to the parties who were illegally deprived of their property. The extent of this injury has not been tried and determined. We cannot look into the evidence to determine that question. That is exclusively a question for the consideration of the trial court. It is enough that the plaintiffs have a clear legal right which has been invaded, and the right to try the question of the extent of their injury has been denied them. It is possible, that upon all the circumstances of the case, the court below may, in the exercise of their discretion, deny a remedy by injunction, or grant it upon terms and conditions such as in their judgment will best preserve the rights and interests of the parties. But the plaintiffs have an undoubted right to the exercise of such discretion by that court. This has been refused them, and for that reason a new trial must be ordered.

The judgments of the General and Special Terms should therefore be reversed and a new trial granted.

Judgments reversed.

All concur.

WOHLFAHRT V. BECKERT.

(38 N. Y. 492.)

Negligence — selling poison — statute.

Where a druggist sells poison, fully warning the purchaser of its dangerous character and clearly informing him as to what is a safe dose, and the purchaser is killed by taking an overdose in disregard of such direction, the druggist is not liable for not having labelled the parcel "poison," in conformity to the statute.

ACTION of damages for negligently causing the death of plaintiff's intestate. The opinion shows the point. The defendant had a verdict, which was set aside by the General Term.

William C. De Witt, for appellant.

Samuel Greenbaum, for respondent.

FINCH, J. Whether this case should have been submitted to the jury depends upon the inquiry whether the testimony of the defendant's clerk is to be taken as the truth of the transaction, or may be questioned or doubted. If he is to be believed, the druggist who sold the poison was guilty of no wrong or negligence toward the deceased, for he warned him that the "black drops" asked for was a strong poison, of which he should only take ten or twelve drops for a dose. Notwithstanding the warning, he took probably ten times the prescribed quantity, in reliance upon the previous statement of the peddler, Silberstein, that he had taken half a glass of what he called "black draught," and that it had cured him. On such a state of facts a verdict against the defendant would not be justified. Although no label marked "poison" was put upon the phial, and granting that by such omission the defendant was guilty of a misdemeanor and liable to the penalty of the criminal law, still that fact does not make him answerable to the customer injured, or his representative in case of his death, for either a negligent or wrongful act when toward that customer he was guilty of neither, since he fairly and fully warned him of all, and more than could have been made known by the authorized label. The statute requires the ringing of the bell or sounding of the whistle by an engine approaching a railroad crossing, but one

who sees the train coming has all the notice and warning which these signals could give, and though they are omitted, takes the risk of the danger which he sees and knows if he attempts to cross in front of the train. *Pakalinsky v. N. Y. C. & H. R. R. Co.*, 82 N. Y. 424; *Connelly v. N. Y. C. & H. R. R. Co.*, 88 id. 346. So here, if the warning was in truth given, if the deceased was cautioned that the medicine sold was a strong poison and but ten or twelve drops must be taken, he had all the knowledge and all the warning that the label could have given, and could not disregard it and then charge the consequences of his own negligent and reckless act upon the seller of the poison. But if no such warning was in fact given, its omission was negligence, for the results of which the vendor was liable both at common law and by force of the statute. *Thomas v. Winchester*, 6 N. Y. 409; *Loop v. Litchfield*, 42 id. 358; s. c., 1 Am. Rep. 543; *Wellington v. Downer Ker. Oil Co.*, 104 Mass. 64; 3 R. S., part 4, chap. 1, title 6, § 25. By the statute it is made a misdemeanor for any person to sell "any arsenic, corrosive sublimate, prussic acid, or any other substance or liquid usually denominated poisonous, without having the word 'poison' written or printed upon a label attached to the phial, box or parcel in which the same is so sold." The liquid sold to the deceased was in fact a poison, and death resulted from taking a trifle less than the quantity sold. The evidence showed that the black drops in both forms of the preparation was "deadly," and that it was usually denominated poisonous is to be inferred both from its well-known character and from the evidence given by the pharmacist, who said that unless selling upon the prescription of a physician, he would mark upon the medicine the dose, or label it poison, or do both. Indeed, the learned counsel of the defendant concedes all this, for he says, "if any third party unacquainted with the real contents of the phial had been injured, then an action would lie against this defendant," and the defense interposed rests wholly upon the fact asserted, that full warning of the poisonous nature of the liquid was given, and the quantity which might be safely taken was stated to the purchaser. So that the question here whether the nonsuit ordered by the trial judge can be sustained or not turns solely upon the inquiry whether the warning was in fact given, and that again upon the question whether the jury would have been at liberty to disbelieve the evidence of the defendant's clerk.

 Moore v. Hegeman.

[Omitting the discussion of this point, upon which it was held that the General Term were right in granting a new trial.]

Their judgment should be affirmed, and judgment absolute rendered in favor of the plaintiff upon the stipulation, with costs.

Order affirmed and judgment accordingly.

All concur.

Order affirmed.

MOORE V. HEGEMAN.

(88 N. Y. 581.)

Marriage — by divorced prohibited party.

A wife procured a divorce in New York for adultery, and the husband was prohibited by the decree from remarrying during her life. The husband afterward remarried in New Jersey, during her life, and returned with that wife and resided in New York, and they had a child born in New York. The New Jersey statute enacts that "all marriages, where either of the parties shall have a former husband or wife living at the time of such marriage, shall be invalid, * * * and the issue thereof shall be illegitimate." The New Jersey statutes do not prohibit remarriage by divorced parties. *Held*, that the child would inherit in New York.*

ACTION to determine the question of legitimacy of issue. The opinion states the case. The plaintiff had judgment below.

Frederick R. Coudert and *Henry M. Whitehead*, for appellant.

William C. De Witt, for respondent.

MILLER, J. This action was brought for the purpose of determining whether plaintiff is the lawful issue of Austin D. Moore, Jr., deceased, and as such is entitled to a share in the estate of his grandfather, the testator, now in the hands of the defendant, Joseph Hegeman, as executor of said estate.

The right of the plaintiff depends upon the validity of the marriage entered into by his father and mother on the 17th day of November, 1877, at Jersey City, in the State of New Jersey. Prior to that time, and on the 21st of November, 1871, the plaintiff's father was married to one Elizabeth Rowe, who, on the 8th day of

* See *People v. Faber*, ante, 537.

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November, 1875, obtained a divorce from him on the ground of adultery. On the 9th of December, 1876, the same parties were, in form, remarried, and shortly after, and on the 26th day of June, 1877, in an action for divorce commenced by Elizabeth, it was adjudged that the second ceremony of marriage was wholly void, on the ground that such attempted marriage was prohibited and made void under the statutes of the State of New York. The judgment in the first action for divorce prohibited the plaintiff's father from marrying again during the life-time of Elizabeth Rowe.

The main question which is presented upon this appeal is, whether the marriage in New Jersey was legal and valid, so as to authorize the plaintiff to claim as a lawful heir of his deceased father. In *Van Voorhis v. Brintnall*, 86 N. Y. 18; s. c., 40 Am. Rep. 505, it is held that the validity of a marriage contract is to be determined by the law of the State where it was entered into; if valid there, it is to be recognized as such in the courts of this State, unless contrary to the prohibitions of natural law or the express prohibitions of a statute. In the case cited a divorce had been granted to the wife on the ground of the husband's adultery, and it was decreed that it should not be lawful for him to marry again until after her death. He afterward, and during her life, married again in the State of Connecticut. By the laws of that State the marriage was valid, and the decision in the case cited holds that the marriage being valid by the laws of Connecticut, a child born from such marriage is legitimate, and entitled to inherit. This case was followed by the case of *Thorp v. Thorp*, 90 N. Y. 602, where the same rule is upheld. See also *Cropsey v. Ogden*, 11 id. 232; *Dickson v. Dickson*, 1 Yerg. 110; 24 Am. Dec. 444. The statute and decree prohibiting the marriage of the guilty party can have no effect beyond the territorial limits of this State. Where the laws of another State do not prohibit such marriage by a party divorced its validity cannot be questioned in this State. The first inquiry which arises in this case is, whether the marriage of Austin D. Moore, Jr., which took place in New Jersey, was valid according to the laws of that State. The statutes of New Jersey relating to divorces contain the following provision: "Divorces from the bonds of matrimony shall be decreed when either of the parties had another wife or husband living at the time of such second or other marriage; and that all marriages where either of the parties shall have a former husband or wife living at the time of

such marriage shall be invalid from the beginning and absolutely void, and the issue thereof shall be deemed to be illegitimate and subject to all the legal disabilities of such issue." This statute provides for the dissolution of the marriage where another husband or wife is living at the time of the second or other marriage, and that such marriage shall be void and the issue thereof illegitimate. It has particular reference to divorces granted by the courts. It speaks of "another" husband or wife, and subsequently in the same sentence of a "former" husband or wife. The word "former" was evidently intended to relate to the language that preceded it in the same section and not to extend beyond that; it is in fact as used synonymous with the word "another." The legislature intended to distinguish between a legal wife or husband and a person claiming to be a subsequent wife or husband, whose marriage was in contravention of law, and the expression was employed to discriminate between the lawful wife or husband and a wife or husband who has subsequently and illegally married. It is very clear that the statute cited had in contemplation a wife or husband who had not been divorced and who was invested with all the marital rights conferred by a lawful marriage. This construction is fully supported by the decisions in the courts of the State of New Jersey. In *Vandegrift v. Vandegrift*, 3 Stew. [N. J. Eq.] 76, the plaintiff asked for a divorce upon the ground that his wife had a "former" husband living at the time of their marriage from whom she had not been divorced. The word "former" was considered as applying to such husband. See *Zule v. Zule*, 1 Saxton [N. J.], 96, and *Dickson v. Dickson*, 1 Yerg. 110.

If the marriage of Austin D. Moore, Jr., with Elizabeth Rowe was dissolved, then he had no former wife living at the time of his marriage in New Jersey, and no provision of the statutes of that State was violated. Elizabeth Rowe, the first wife, was freed from the marital relations and had a perfect right to marry anywhere and the husband had a right to marry in any other State where such a marriage was not prohibited by law. The interpretation we have placed upon this statute is also supported by the statutes of New Jersey in regard to bigamy, which declare as follows: "If any person being married, or who hereafter shall marry any person, the former husband or wife being alive, then the person so offending shall be deemed guilty of a high misdemeanor and on conviction thereof shall be punished by * * *. But neither this act nor

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any thing therein contained shall extend to any person * * * who is or shall be at the time of such marriage divorced by the sentence or decree of any authority or court having cognizance thereof, nor to any person where the former marriage hath been, or shall be, by the sentence or decree of any such authority or court, declared to be void and of no effect."

This statute, while using the words "former husband or wife," expressly exempts such a marriage as the one under consideration from the inhibition contained in the statute. It may also be remarked that the effect of the construction contended for by the appellant would be to prevent marriages, by the innocent parties, in many cases where divorces have been granted for legal causes. Without enumerating the different cases where such an interpretation would render the marriage unlawful, it is sufficient to say that it would have prevented the lawful marriage in the State of New Jersey of the wife of Austin D. Moore, Jr., who had obtained a divorce from her husband on the ground of adultery, and this clearly could never have been intended by the legislature. The counsel for the appellants further claims that at common law the marriage which is now claimed to be valid would be null and void, and that inasmuch as the State of New Jersey has with great fidelity and consistency adhered to and followed common-law rules, and its legislature has enacted a statute upon the subject, it is very important to consider the common law as it previously existed, in the interpretation of the statute. The object of a statutory enactment is sometimes to change the common-law rule, and where that is the case such rule is not a proper subject of consideration in the interpretation of the statute, and it cannot be said in this case that the common law is presumed to exist, for there is no absence of statutory provision on the subject. As the statute has superseded and taken the place of such rule and established another and a different one, it should be considered in accordance with its intention and the purpose which it was designed to accomplish.

The appellant's counsel insists that the same language which is contained in the statutes of New Jersey (*supra*) is used in this State in 2 Revised Statutes, 147, § 20, which provides that a marriage contract may be declared void for this among other causes: "That the former husband or wife, or one of the parties, was living, and that the marriage with such former husband or wife was still in force." The New Jersey statute which is cited must be

considered without regard to the statute of this State. The two statutes are entirely independent of each other, and there is no such similarity in their language as would authorize the same construction to be placed upon each of them. The latter stands by itself and does not contain the word "another," which is employed in the New Jersey statute, and in its construction the same question is not presented. There is therefore no analogy between these different statutes which would make the interpretation of the one applicable to the other.

The appellants also rely upon the case of *Cropey v. Ogden*, 11 N. Y. 234, which involved the construction of the statute prohibiting certain marriages in this State. The statute referred to provides that "No second or other subsequent marriage shall be contracted by any person during the life-time of any former husband or wife of such person." We are unable to perceive how the decision of the court in this case can affect the construction to be given to the statute of the State of New Jersey, which is entirely different in its language from the statute which was the subject of consideration in the case cited, and hence we think it is not applicable. It may also be remarked that the case of *Van Voorhis v. Brintnall*, *supra*, is not, we think, inconsistent with *Cropey v. Ogden*.

[Omitting minor considerations.]

The judgment should be affirmed.

Judgment affirmed.

All concur.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

FUNKE V. DREYFUS.

(34 La. Ann. 80.)

Trade-mark — infringement — decoit — acquiescence.

A trade-mark may be acquired in the words "Boker's Stomach Bitters," and it will not be defeated by the plaintiff's unwarranted use of the word "imported" in connection with it, unless such use is intended to deceive the public, nor by the plaintiff's mere neglect to prosecute others who have infringed it.

ACTION for infringement of trade-mark. The opinion states the case. The plaintiff had judgment below.

Leroy & Kruttschnitt, for appellee.

Charles S. Rice, for defendants and appellants.

LEVY, J. Similar judgments, based on the same evidence in both these cases, have been rendered, and they are consolidated for trial before this court. The defendants are the appellants.

Plaintiff alleges infringements of his trade-mark of a preparation known as "Boker's Bitters," by defendants, and in his suits prayed for and obtained injunctions, and sought damages on account of said infringements. They were judgments in the lower court, per-

petuating the injunctions and awarding to plaintiff, in each of the suits, damages to the extent of \$500.

In his petition, plaintiff alleges, that since February, 1860, he has manufactured a medicinal preparation, or bitters, of great value, which has been successfully used as a specific in certain diseases; that this preparation has always been made of the best Cologne or French spirits, mixed with other ingredients of good quality and valuable curative properties, and to this preparation the name of "Boker's Stomach Bitters" was given many years since, and is the peculiar name by which it has always been known in the markets of this and other countries; that it has been officially recognized by the United States commissioner of internal revenue, who has decided it to be a medicinal preparation, which if properly stamped, may be sold by druggists and apothecaries, without rendering them liable to pay a special tax as liquor dealers; that these "Bitters" were first manufactured in 1828, by John G. Boker; from 1828 to January, 1853, their manufacture and sale was conducted by said John G. Boker, in conjunction with his brother, E. Boker, in the name of John G. and E. Boker; E. Boker died in 1853, and the business was then conducted under the style of John G. and his son, J. Boker, the former continuing as sole owner of the trade-marks, and receipts and manufacture. On the 29th of February, 1860, John G. Boker sold the business, the good-will, the trade-marks, receipts, and every thing pertaining to the manufacture and sale of the "Bitters" to plaintiff, who was the son-in-law of said John G. Boker; that since said sale, plaintiff has been the sole and undisputed owner of said business, receipts and trade-marks, labels, and rights to use the same, and signatures of the old firms, and has had the exclusive right to manufacture and sell said bitters, and has manufactured and sold them in large quantities, made of the best and finest materials; that, in 1853, the manufacturers adopted as a name and trade-mark, the words: "Boker's Stomach Bitters;" that from that date, they branded on the boxes or packages containing this preparation these words, and on the top of the boxes: "J. G. & J. B. Boker," and since, after notice to that effect, there has been an additional label with a *fac simile* of the signature of said firm; that at the same time and ever since, the manufacturers, for the further purpose of distinguishing the said bitters, have affixed to every bottle thereof, a red label with the words: "Stomach Bitters, imported by J. G. & J. B. Boker,

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New York," printed thereon, and elaborated ornamentally, which they made part of their trade-mark for labels, and to avoid counterfeiting they put up their bitters in bottles of peculiar shape, easily distinguished from bottles generally used for other bitters; that his assignor invented the name "Boker's Stomach Bitters" and he was first to use the same, and the symbols, bottles and insignia described as his trade-mark; that his said business has involved great expenditure of money and labor; that said trade-mark has become very valuable to him, etc.; that the defendants have for several years illegally manufactured and sold, and are still manufacturing and selling an inferior quality of bitters, which they represent to be the bitters manufactured and sold by plaintiff, and with the intention to deceive the public, and fraudulently derive advantage thereby, they have used the same form of bottles, adopted by plaintiff, and have affixed thereto a notice similar to plaintiff's and a counterfeit of the signatures of John G. and J. Boker, and a counterfeit and close imitation of the red label of plaintiff and the words thereon, and the symbols and insignia surrounding said words, and with same intent, have imitated and counterfeited on the boxes used by them the labels and words selected and used by plaintiff and his assignor, as set forth above. He also alleges that the sale of inferior bitters by the defendants, as the genuine "Boker's Stomach Bitters" has greatly injured the reputation of plaintiff's preparation, and this has materially injured plaintiff in his business.

Defendant filed an exception of no cause of action and also answered, denying that the words used by plaintiff constitute a trade-mark, and alleging that even if they do, plaintiff has no right or ownership therein entitling him to the exclusive use and appropriation of the same; that for more than twenty-five years the pretended trade-mark has been and is now in common public use, and this has not been objected to, but has been acquiesced in by plaintiff and his assignor, and that no exclusive right to the same can be maintained. Further, they aver that the representation on the labels that the said compound is imported is false and fraudulent and intended as a fraud upon the public, and therefore plaintiff is not entitled to the exclusive use or the protection demanded by him. He avers also that plaintiff holds out to the public, not that he is the owner, but that he is the agent of the proprietors, whose names are not discovered; that if he is agent, he is without right to stand

in judgment; that if such representation is not true, then he is guilty of fraud and deceit upon the public, which estops him from demanding the interposition of this court. They also deny that the preparation is possessed of medical and curative qualities, and aver that such representations are a fraud and estop plaintiff's demand.

The defenses set up in the answer may be thus summarized, and will be considered in their order :

1. That plaintiff has not proved by legal evidence his proprietary interest in the trade-marks and labels.

The testimony of many witnesses in the record proves satisfactorily that plaintiff and his vendors for a great number of years have been in the ownership of the trade-mark and labels, and the testimony was not objected to. The objection to the admissibility of the copy of the act of sale to plaintiff, as evidence, was not ruled upon, and no bill of exceptions was taken to its admission. We think the ownership is fully proved. 1 Dill. 329 ; 9 La. 424.

2. That plaintiff has failed to prove that these bitters have medicinal properties.

The testimony and indeed the universal opinion on the subject makes it clear to our mind that bitters are regarded as tonics and are useful in the correction of many disorders of the stomach; that these particular bitters have been in general use, as such, for a very long time; that they are pure and made of good materials; that the United States Internal Revenue Department recognized them as valuable and exempted them from the special liquor tax, which exemption is only made in cases of liquors which are regarded as forming part of medicinal preparations. 100 U. S. 617; 6 Wait Actions, 27 ; *Wolfe v. Barnett*, 24 La. Ann. 97.

3. That plaintiff is guilty of fraud in representing on his labels that the bitter is "imported," and is thus disentitled to equitable remedy.

The evidence satisfies us that the use of this word on the label was not made for the purpose of deceiving the public or with fraudulent intent.

In the case of *Wolfe v. Barnett*, 24 La. Ann. 97, this court held, "but if the trade-mark consists of something else, as the plaintiff's own name combined with a sonorous appellation, well calculated to express origin and ownership, as well as to attract the attention and impress the memory of buyers, it is only necessary that he

should manufacture, without exclusive right, or represent a manufacture." And we think the true rule, as applicable to this case, is correctly stated in the following passage (from Upton on Trade-Marks, page 97) to be this :

"That the honest, skillful and industrious manufacturer or enterprising merchant, who has produced or brought into the market an article of use or consumption that has found favor with the public, and who, by affixing to it some name, mark, device or symbol, which serves to distinguish it as his, and to distinguish it from all others, has furnished his individual guaranty and assurance of the quality and integrity of the manufacturer, shall receive the first reward of his honesty, skill, industry or enterprise ; and shall in no manner and to no extent be deprived of the same by another, who to that end appropriates and applies to his productions the same or a colorable imitation of the same name, mark, device or symbol, so that the public are, or may be, deceived or misled into the purchase of the productions of the one, supposing them to be those of the other. 17 Barb. 608 ; 3 Sandf. 725 ; 25 Barb. 416."

In the case of *Insurance Oil Tank Co. v. Scott*, recently decided by us and reported in 33 Ann. 946, this court considered and passed upon a question much like this ; in the last-named case, the word "patented" being used upon the labels or plates, when it was contended that the article had not been really patented. We there held : "Defendant urges that the use of the abbreviation 'Pat.' meaning patented, in the trade-mark, is a fraud on the public, and a violation of law, which deprives plaintiff of the right of redress. It is undoubtedly true that the affixing of the word 'patent' to an unpatented article, for the purpose of deceiving the public, is prohibited, under penalties, by the laws of the United States (U. S. R. S., § 4901) ; and that a representation in a trade-mark that an unpatented article is protected by a patent *prima facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of the mark to relief in a court of equity, as against a pirate. Browne on Trade-Marks, § 572 ; Coddington Digest Tr.-M. Cases, § 548 ; 39 Conn. 450. But to have such effect, the use of the word 'patented' must be 'with the purpose of deceiving the public,' and if such fraudulent intention does not exist, and the use of the word may be explained in any reasonable sense consistent with truth and honesty, the party will not be prejudiced. High on Injunctions, § 674 ; Coddington Dig., §§ 570, 571." Also: "It

may be, as contended by defendant, that the oil sold by him under plaintiff's trade-mark is equal in all respects to the oil of plaintiff. But if defendant may use this mark, other less conscientious dealers may employ it for inferior and dangerous oils; and the public would thereby be deprived of the security now enjoyed in the purchase of oil so marked, and the business of plaintiff would be destroyed." *Id.* "Defendant has no right, in justice or in law, to trade upon the reputation and business sagacity and enterprise of plaintiff, which are represented by and embodied in its trade-mark." *Id.* See also *Coddington Dig.*, §§ 546, 543, 558, 561, 565, 570, 571; *Cox on Trade-Marks*, 117, 195, 591, 106, 180.

The use of the words "sole agent," by plaintiff, which is dwelt upon by the defense, has been satisfactorily explained and falls under the above reasoning, because they were not used for the purpose of deceiving the public or with fraudulent intent.

4. Defendants contend that from long use by others, they were justified in imitating the trade-mark, and they supposed acquiescence on the part of the owner.

The doctrine of acquiescence is ably and elaborately discussed in *Browne on Trade-Marks*, § 685. That author says: "STORY, J., once spoke thus: Again it has been said that other persons have imitated the same spools and labels of the plaintiffs, and sold the manufacture. But this aggravates rather than excuses the misconduct, unless done with the consent or acquiescence of the plaintiffs, which there is not the slightest evidence to establish; or that the plaintiffs ever intended to surrender their rights to the public at large or to the invaders in particular." *Taylor v. Carpenter*, 3 Story, 458. In another case, *WOODBURY, J.*, said: "I am not aware of any principle by which a usage in this or a foreign country is competent evidence in defense of a wrong." "But I am not aware that a neglect to prosecute, because one believed he had no rights, or from mere procrastination, is any defense at law, whatever it may be in equity." "There is something very abhorrent in allowing such a defense to a wrong, which consists in counterfeiting others' marks or stamps, defrauding others of what had been gained by their industry and skill, and robbing them of the fruits of their 'good name,' merely because they have shown forbearance and kindness." "It is rather an aggravation to the plaintiff that many others have injured them." 2 Wood. & M. 1; *Filley v. Fasset*, 44 Mo. 173.

5. Defendant invokes the prescription of one year. We do not

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think it tenable. We concur with counsel for the plaintiff and the authorities cited by him, that the "infringer who illegally appropriates an invention to his own use, making profit thereby, may be treated as his trustee in respect of such profits and compelled to account therefor in equity." Browne on Trade-Marks, § 507; Louque Dig. p. 571; 19 Ann. 492, etc.

Under all the circumstances of this case however we are not disposed to increase the damages allowed by the lower court.

The judgments appealed from are therefore affirmed at costs of the appellants.

Rehearing refused.

Judgment affirmed.

SUMMERS V. CRESCENT CITY RAILROAD COMPANY.

(84 La. Ann. 129.)

Negligence — railway company — contributory negligence.

It is negligent in a street railway company to have two tracks laid so near together that a passenger's arm projecting a few inches from a car window may be hit by a passing car, and it is not necessarily negligent in the passenger to allow his arm so to project.*

ACTION of damages for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

L. L. Levy and T. J. Semmes, for appellee.

John M. Bonner, for appellant.

FENNER, J. On the 20th October, 1877, at between 2 and 3 o'clock, P. M., plaintiff became a passenger on car No. 18, of the defendant, a street railroad company, and there being few passengers, seated himself with his body inclined toward the front of the car, his side toward the open window, upon which his left arm rested, with his elbow projecting out of the car a few inches. While thus situated, the said car No. 18, at a certain curve in the track, met car No. 4 of the same company, coming down an adjoining

* See *Memphis, etc., Co. v. McCool* (33 Ind. 205), 43 Am. Rep. 71, and note, 73.

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track of defendant, and in passing each other at this point, the last-named car struck defendant's elbow, breaking his arm and otherwise injuring him, for which injuries he seeks redress in this action for damages.

The action rests upon the charge, that the plaintiff's injury was caused by the fault or negligence of the defendant. The defense is two-fold : 1. Denial of negligence on the part of defendant ; 2. Assertion of contributory negligence on the part of plaintiff.

Evidence responsive to pleadings, establishes the following essential facts :

Defendant's original contract with the city, passed in 1865, authorized the construction of a double-track railroad, commencing on the neutral ground of Canal street at its junction with Magazine street, and required that "the tracks shall be three feet distant from each other, from out to out of rail." The road was built, and a turn-table constructed at the corner of Canal and Magazine.

By city ordinance, approved October 14, 1867, defendant was "authorized and required to extend its road to the intersection of Canal and Camp streets, and to establish a stand and turn-table' at that point, "the city surveyor to furnish the lines and levels for the extension, and to give full directions how the work is to be done," etc.

Legal obstructions prevented the building of this extension until 1873, when application was made to the then city surveyor to furnish lines and levels for the work.

The testimony of that officer, and of his employees, is quite positive that they staked out the work from Camp street, to a point near the then existing turn-table of the company, beyond the intersection of Magazine street, but did not complete the lines to the actual junction with the old road, because it would have interfered with the operations of the road during the construction; that after the part staked out had been built, they expected to be called on to complete the lines and levels ; but that they were never so called on, and never laid out the additional work, which was done by the company without their knowledge. In this intervening space, is found the curve on which the injury to plaintiff occurred, and it is established by the report of experts appointed by the court, that at the narrowest point on this curve, the distance between the tracks is only two feet four and one-half inches "from

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out to out of rails," instead of three feet as required by the original contract.

Car No. 18, in which plaintiff was at time of injury, was of the class and size of cars ordinarily used by defendant and other city railroads. The report of experts shows the width of its body to have been seven feet three and one-eighth inches, and the length fourteen feet two inches.

Car No. 4 which collided, was one of four special summer cars, bought by the defendant within four years prior to the accident, of which two were occasionally, and at certain seasons only, run over this portion of defendant's road. It was much larger than the ordinary cars, having a width of body of seven feet eleven and three-fourths inches and a length of sixteen feet one and one-half inches.

The original contract of defendant required that "the cars shall be similar to those used on other city railroads." The evidence is not very distinct as to what kind of cars were in fact "used on other existing roads at the date of the contract; but it shows that defendant, from the commencement of its operations, had used cars similar to, or not substantially variant from, car No. 18 in size, up to the date of purchase of the four cars of exceptional size above referred to, which were the only ones it ever used substantially differing from car No. 18.

The report of experts shows that when cars 18 and 4 were placed, at rest, and side by side, on this curve, there was a distance between the uprights of their respective windows of 4 3-16 inches. It appears however from the evidence, that when in motion the wheels of each car have a lateral play on the rails of $1\frac{1}{4}$ inch; that the bodies being mounted on India-rubber springs, have a slight additional lateral play; and finally, that the bodies of the cars project several feet in front of the wheels, so that (the curve in each track being inward toward the other track) in passing the curve, as the bodies are only deflected when the wheels reach the successive points of curvature, an additional proximity is created between the cars in passing each other. All these elements concurring, it is evident that under conditions likely to occur, cars Nos. 4 and 18, in passing at the same time the narrow point of this curve, might graze if not collide with each other; and there is some evidence tending to show that on this particular occasion such collision did actually occur. This however is disputed, and is of no consequence.

The evidence, as well as common observation, establishes that it is a customary practice for persons riding in the street cars of this city, when not crowded, to sit with an arm resting on the window, and projecting more or less outside of the car. This practice is suggested, if not invited, by the construction of the windows, which are of a height that renders such a position easy and comfortable, and also by the natural inclination to face the direction in which one travels, to look out at passing objects, and in a climate like ours, to turn the face so as to catch the breeze. The practice is so common that no one could possibly ignore its existence. Under customary conditions of construction universally prevalent here, the distance between parallel tracks and between passing cars is such as to render the practice absolutely free from danger of such collision as that which injured plaintiff. It does not appear that there is any point on any railroad in the city where cars would pass each other so closely as to expose a person in the position of plaintiff to the slightest danger. It is affirmatively shown that there is no such point on the line of defendant except this particular one, and even there the injury could not have happened but for the exceptional width of one of the cars.

It appears that on certain roads where tracks are bordered by avenues of trees, rendering such exposures of the person perilous, care is taken to post notices or to construct wire screens to prevent them. Upon the up-town portion of defendant's line, where the wide cars like No. 4 were more commonly used, defendant has given special instructions to its drivers to be careful in passing each other on a curve existing there, although the tracks were three feet apart. But at this Canal street curve, with so much narrower space between the tracks, no such instructions were given, no notices of any kind were posted, no precautions taken, and in point of fact, at the time of this accident, car No. 4 was passing the other car, on this curve, at a full trot, and without the driver's paying any attention to the position of passengers in either car.

We have been thus explicit in stating facts and circumstances, because in cases involving questions of negligence, or that kind of fault which corresponds to the *culpa levis* of the civil law, the difficulty lies not so much in ascertaining the legal principles, as in applying them to particular states of fact.

We may, at the outset, say that the doctrine of contributory negligence on the part of plaintiff, as a valid defense in such actions,

is too firmly rooted in our jurisprudence to be open to further question. *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* Where the injury results from the negligence of plaintiff and the negligence of defendant, in such manner that the negligence of each may be considered as a juridical cause of the injury, the law will not undertake to apportion either the blame or the damage. As said by a learned judge, "the law has no scales to determine in such cases, whose wrong-doing weighed most in the compound that occasioned the mischief;" and by another, "the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct." *Thomp. Neg.* 1147.

It must be observed however that in determining what constitutes negligence, precisely the same rules must be applied to the acts of defendant charged as negligence, and to the acts of plaintiff charged as contributory negligence.

Definitions of negligence by text-writers and judges are almost as numerous as the text-books and decisions on the subject.

We venture however to give another, compounded from the definitions of negligence by Baron ALDERSON and by Mr. Wharton, and of the definition by the latter of "negligence as the juridical cause of injury." *Whart. Neg.*, §§ 1, 3, 73.

Juridical negligence is the inadvertent omission to do something which it would be the legal duty of a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, to do, or the inadvertently doing something which it would be the legal duty of a prudent and reasonable man not to do — such act or omission being on the part of a responsible human being, and being such as in ordinary natural sequence immediately results in the injury complained of.

This definition, though perhaps redundant, includes, unequivocally, all essentials, and excludes acts not properly within the domain of negligence. It excludes offenses or intentional wrongs. It excludes mere moral duties. It excludes irresponsible persons, of whom various classes are mentioned by Mr. Wharton. And it excludes all acts or omissions, which though they may be negligent with reference to certain relations or contingencies, have no causal connection with the injury complained of.

A man who commits a negligent act takes upon himself the risk

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of all injuries, which, according to common experience and in the exercise of reasonable foresight, might have been anticipated as the consequence thereof; but this is the extent of his responsibility.

As said by Mr. Wharton, "the particular damage is to be viewed concretely, and the question asked, 'was this in ordinary natural sequence' from the negligence? If so, the damage is imputable to the party guilty of the negligence." In the language of Lord CAMPBELL, "if the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong or the damage are not sufficiently conjoined or concatenated, as cause and effect, to support the action." *Gerhard v. Bates*, 2 Ell. & Bl. 490.

Applying these principles to the facts of this case, which we have so fully and carefully stated, the first question is:

Was the defendant guilty of negligence?

Assuming that defendant violated the law, either in constructing its tracks so closely together, or in using cars of the width of No. 4, that alone would be sufficient to establish its fault. But although the preponderance of evidence is decidedly in favor of this assumption, yet as it is vehemently controverted and not absolutely free from doubt, we prefer to rest our decision on broader principles.

As a carrier of passengers, it is elementary that defendant's duty was to exercise diligence, skill, care and foresight, to carry them safely. *Penn. Co. v. Roy*, 102 U. S. 451.

It was bound to know that its passengers, in common with those on other street railways, were in the habit of riding with their arms resting on the window and projecting outside of the car; that under the usual conditions of construction of parallel tracks in this city, this practice was free from danger of collision with passing cars on their respective tracks; that the width between its own tracks at this curve was exceptionally narrow; that the car No. 4 used by it was exceptionally wide; that such car, in running over that curve, was liable to meet another car, that in such meeting, they would, under conditions perfectly probable, pass each other so closely as if not to collide, to come very near touching; that in such event, a passenger in either car occupying the position shown to be very commonly occupied would inevitably be injured.

Knowing these things, a reasonable care for the safety of others

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would have dictated the duty of using precautions to avoid the danger. Sufficient precautions might have been used without any inconvenience to defendant. The curve was short, and but little delay would have been occasioned by forbidding their drivers to pass each other at that point; or by instructing them to drive slowly and give warning to exposed passengers; or by any other mode of effective notice. Defendant used no precaution of any kind. Its conduct presents every element of negligence, as defined by us. As well said by an able judge: "When we are engaged in an act which the surrounding circumstances indicate may be dangerous to others, and when the event whose occurrence is necessary to make our act injurious is one which we can readily see may occur under the circumstances and unite with the act to commit the injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury." *Fairbanks v. Kerr*, 70 Penn. St. 86; s. c., 10 Am. Rep. 664.

We are next to inquire whether plaintiff was guilty of any contributory negligence.

The sole negligence charged is his act in sitting as he did, with his arm resting on the window, and his elbow projecting out of the car. Applying the principles already enunciated to the facts stated, we are of opinion that there is a complete want of causal connection between this act and the injury. We cannot express the principles applicable in such a case more forcibly than was done by the court in the case last quoted: "We are not to link together, as cause and effect, events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen, in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury; but we are not justly called to suffer for it, unless the other event was the effect of an act, or was within the probable range of ordinary circumspection, when engaged in the act."

It seems to us manifest, under the circumstances of this case, that no ordinary circumspection or foresight would have suggested to the most cautious person, situated as plaintiff was, the slightest probability of danger from the meeting of a car on a parallel track. Seeing a car so approaching, he would have been perfectly justified, according to all common experience, in diverting his atten-

tion and resting in the perfect confidence that it would pass without touching him.

If the car had jumped the track and had thus collided with the exposed arm of plaintiff, a different question would be presented. *Quoad* such a contingency, the act of plaintiff might have been juridically negligent. A prudent man might well foresee the possibility of such an occurrence, and might well be held to have taken upon himself the risk of such a peril. But viewing the particular damage here suffered concretely, Mr. Wharton's question, "was it an ordinary natural sequence from the negligence," must be answered in the negative.

The cases relied on by defendant's counsel as to similar exposures of person in steam railway carriages have, in our opinion, no applicability here. They are founded upon the common experience, as Mr. Wharton justly says, "of the closeness with which cars on double tracks and switches must necessarily pass to each other." Whart. Neg., § 360.

The slightest observation of the construction and operation of steam railways would serve to warn any one of the danger of such exposures, resulting from the frequent proximity of tracks, as well as from other contingencies.

The precisely contrary result of observation and experience with reference to street railways in New Orleans, as shown by the evidence, removes this case from the operation of such authorities.

[Minor matters omitted.]

Judgment affirmed, at cost of appellant.

Rehearing refused.

Judgment accordingly.

STATE V. DERANCÉ.

(34 La. Ann. 186.)

Criminal law — burden of proof of insanity.

When insanity is set up as an excuse for crime, the burden of proof is on the accused, and the defense must be proved beyond a reasonable doubt. (*See note, p. 485.*)

CONVICTION of manslaughter. The opinion states the case.

J. C. Egan, attorney-general, '*J. J. Finney*, district attorney, and *Whittaker & Adams*, for appellee.

Castellanos & Gastinel, *Lucien Marrero* and *S. J. N. Smith*, for appellants.

LEVY, J. The defendants were indicted for the crime of murder, and found by a jury guilty of manslaughter, and by judgment of the Criminal District Court for the Parish of Orleans, sentenced each to imprisonment at hard labor in the State penitentiary, for the term of five years, from which sentence and judgment they have taken this appeal.

The principal complaints of the defense, and on which they mainly rely for a reversal of the judgment, are as follows :

1. Of error of the judge *a quo* in his charge to the jury, relating to the law of evidence, on the question of insanity.
2. Of error in the principles of law laid down by the judge in the same charge, relative to self-defense.
3. Of error of the judge in overruling several of defendants' challenges for cause, to their manifest injury and prejudice.

First. Defendants except to the following portion of the judge's charge : " Among the different modes of defense relied on, in cases like the present, the plea of temporary mental derangement, or technically, of transitory mania, may be set up in behalf of the accused, and facts to establish it are admissible in evidence, as tending to show want of criminal intent, and therefore of malice, and therefore of guilt, in the commission of the act forming the basis of the indictment. Here the burden of proof is made to shift from the State to the defense. The defense, and not the State, must then prove that sanity, ' the normal condition of the human understanding,' did not exist in the accused on the occasion and at the occurrence referred to in the charge. But to have any serious weight in the eyes of the jury, such alleged unsoundness of the mind, or momentary insanity, must be shown to have been an undoubted fact, not before or after, but at the very time the unlawful act complained of was committed. It is at that particular time that it must be established beyond a reasonable doubt, that there existed, on the part of the accused, no capacity to discern right from wrong, as to the act forming the basis of the charge. Unless the jury be satisfied in this respect, such a plea necessarily falls,

and the presumption of sanity remains unshaken, and needs no evidence in its support."

The defense insists that the error lies in the instruction, that the alleged insanity must be shown to be an undoubted fact, or in other words, "it must be established beyond a reasonable doubt, that there existed, on the part of the accused, no capacity to discern right from wrong, as the act forming the basis of the charge. Unless the jury be satisfied in this respect, the presumption of sanity remains unshaken and needs no evidence in its support."

We have been at great pains to examine the text writers on criminal law, and not only the decisions cited both by counsel for the State and the defense, but such other authorities within our reach, which are applicable to and have a bearing on this question. We have considered also the English writers and English decisions on the subject.

In Wharton's Criminal Law, vol. 1, § 16, it is said, quoting an English decision: "The jury ought to be told, in all cases, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." In section 55, same volume: "By the common law every man is presumed to be sane until the contrary be proved; and the better opinion is, that when insanity is set up by the defendant, it must be proved as a substantive fact by the party alleging it, on whom lies the burden of proof;" and he cites the following American authorities: 4 Cr. C. C. 514; *Attorney v. Parnther*, 3 Brown C. C. 441; 1 Curtis, 1; *State v. Spencer*, 1 Zab. 202; 8 Jones, 463; 1 Strobh. 475; 5 Ala. 244; 20 Cal. 518; 20 Gratt. 860; 7 Gray, 583; and in section 55, on the other hand, he states: "If a plea to the jurisdiction is entered, to the effect, for instance, that the offense alleged was committed in a foreign country against a foreign prince, or if there be a motion for a transfer of venue, the court in ruling the question, has nothing to do with the presumption of innocence or guilt. It is governed by a preponderance of testimony. *A fortiori* must this be the case on the issue of insanity,

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when the defense is not partial or exceptional, but universal and thorough unamenability to criminal process."

In 1 Archbold's Crim. Prac. and Plead. 37, note 1 (7th ed.), it is said: "The law presumes a man sane until the contrary is proved. Hence, it has been repeatedly decided that the evidence of the prisoner's insanity, at the time of the act, ought to be clear and satisfactory." *State v. Spencer*, 1 Zab. 196. "The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be, in order to find a sane man guilty." *Id.*; 21 Mo. 464, to the same effect.

In addition to the English common-law authorities and decisions, we find the doctrine enunciated in the charge of the judge *a quo*, adopted in numerous decisions of the courts of States of this Union.

"The law demands such evidence in support of the defense of insanity as will satisfy the jury, that when the defendant committed the act he was insane." 53 Mo. 267; 2 Green Cr. 597; 16 B. Monr. 587. "It must be proved, that at that time, the accused was laboring under such a defect of reason as not to know the nature and quality of the act he was doing, or, that he did not know he was doing wrong, and this must be clearly established." 3 Sm. & Marsh. 518; 47 Cal. 134; 2 Green Cr. 441. The contrary doctrine is held in 11 Kans. 32; 2 Ind. 170; 3 Heisk. 348.

In 20 Gratt. 860, we find: "Where the prisoner relies on the defense of insanity, he must prove it to the satisfaction of the jury. If upon the whole evidence they believe he was insane when he committed the act, they should acquit him; but not upon any fanciful ground, that though they believe he was then sane, yet as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal." "Insanity must be established by evidence in the case with the same clearness and certainty as any other fact alleged in defense; that is to say, the proof must be such in amount that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane." 24 Cal. 230; 39 *id.* 690; *aliter*, 49 N. H. 399; 57 Me. 574; 7 Gray, 583.

In Pennsylvania, when a homicide is admitted and insanity alleged as an excuse, the prisoner will be presumed to have been sane, until the contrary is made to appear in his behalf. The evi-

dence to establish insanity as a defense must be satisfactory and not merely doubtful. 76 Penn. St. 414; 77 id. 205; *aliter*, 43 Mo.

In New Jersey, when the defense is insanity, the burden of proof is on the prisoner, and the jury must be satisfied of the insanity beyond a reasonable doubt. 1 Zab. 197; 47 Cal. 134.

In the case of *Newcomb v. State*, 37 Miss. 405, the court held: "The presumption is that a man is of sane mind, and unless that presumption be removed by proof, it must likewise stand. Hence, if it be established by legal evidence that he has committed an act criminal in law, the presumption in law being that he was of sane mind, that presumption is not overcome by the mere probability that he was insane, but will stand until overthrown by evidence; and therefore mere probability of insanity cannot prevail over the presumption of sanity, so as to work the acquittal of the party on the ground of insanity. Accordingly it is laid down, that in order to establish a defense on the ground of insanity, it must be clearly proved." 2 Greenl. Ev., § 373.

With all the conflicting views and authorities before us, we are of the opinion that the rule, as recognized and laid down in the charge of the judge *a quo*, does not contain error, and should not be overruled.

To adopt the doctrine contended for by the defense would, in our opinion, be productive of most baneful results to society, and tend to shield wrong-doers from the penalties of the law by the invocation of a plea containing in itself an affirmative proposition, the proof to sustain which would require only the flimsy evidence upon which a doubt might hang. We do not think that the *onus* of negating the affirmation of insanity should be thrown upon the prosecution, but rather that positive and certain proof should be required to sustain it. The defendant should not be allowed to escape punishment for his wrongful act, unless it be proven clearly and satisfactorily that, by reason of insanity and incapacity to discern between right and wrong, existing at the time when the crime or offense is charged with having been committed, he was irresponsible for his act. When this special plea or defense is set up, to do away with a legal presumption, universally recognized as applying to persons charged with crime, based upon what is regarded as a physical and physiological fact, the interests of the Commonwealth and the safety of society demand that the affirmative allegation on which he relies to establish in his case an exception to such general

rule and fact, should be established beyond a reasonable doubt. We therefore do not think the prosecution should be required to prove sanity, but the proof of insanity is thrown on the accused, who affirmatively alleges its existence. The prosecution must prove all its essential affirmative allegations beyond reasonable doubt; the burden of proof on this plea rests upon the defense urging it; and its truth must be also established beyond reasonable doubt. See 27 Ann. 692.

[Minor points omitted.]

The sentence and judgment appealed from are affirmed at appellants' costs.

BERMUDEZ, C. J., takes no part in this decision.

ON APPLICATION FOR REHEARING.

FENNER, J. We have given much reflection and earnest consideration to the learned brief for rehearing filed herein by counsel for defendants, and especially to their views touching the law applicable to insanity as a defense in criminal prosecutions.

The presumption of innocence and the presumption of sanity are both embraced within the class of disputable presumptions of law corresponding to the *præsumptiones juris* of the Roman law, which may always be overcome by opposing proof. 1 Greenl. Ev., § 33; 1 Whart. Cr. L., § 707.

It cannot be sensibly urged that the presumption of sanity is the less powerful of the two, since it is the basis of all human responsibility, the foundation of all law, and the accepted guide of conduct in all the transactions and relations of mankind. Experience certainly demonstrates, that in prosecutions for crime, the presumption of innocence is rebutted a thousand fold more frequently than the presumption of sanity, and the application of any other test would not exhibit a different result. Inasmuch as human experience is the foundation of presumptions, this would seem to indicate that the presumption of sanity is the better founded and more powerful of the two.

The doctrine that in criminal cases the guilt of the accused must be established beyond a reasonable doubt rests on no other reason or principle than that such proof is necessary to overcome the presumption of innocence. Now, if as we have shown, the presumption of sanity is of like character, and of equal if not superior strength, why should it be overcome by a less degree of proof?

It cannot be successfully maintained, that in criminal cases the presumption of sanity is neutralized, or overcome, or nullified by the presumption of innocence. The weight of authority is overwhelming in favor of the doctrine, that when the State has established the *corpus delicti* in such manner that the accused, if sane, would be held guilty, the presumption of innocence is rebutted, and the presumption of sanity comes into full operation to complete, by its own force, the case of the State; and that if the accused relies upon the defense of insanity, the burden of proof is thrown upon him and he must establish it by such proof as will rebut the presumption of sanity.

The question upon which English and American courts are mainly divided is as to the kind and degree of evidence required to effect such rebuttal.

This question is not concluded by authority. Courts have propounded three theories, viz. :

1. That insanity, as a defense, must be proved beyond a reasonable doubt.
2. That the jury are to be governed by the preponderance of evidence.
3. That the prosecution must prove sanity beyond a reasonable doubt.

Whart. Cr. L., § 55.

The last theory does not commend itself to our judgment, is supported, in its full extent, by few authorities, and is directly contrary to the jurisprudence of this court, as established in the only case in which the subject was directly considered, and where it was held, that "when insanity is pleaded in defense of a criminal act, it must be clearly shown that it existed at the time of the act," and that "every person is presumed to be sane until the contrary is proved, and it is for him who sets up this defense, to prove it by evidence which will satisfy the minds of the jury that the party was insane at the time of the commission of the offense." *State v. Coleman*, 27 Ann. 691.

The joint opinion of the judges of England, delivered to the House of Lords, through Lord Chief Justice TINDAL, declared that "the jury ought to be told, in all cases, that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved," etc. *McNaghten's case*, 10 Clark & Fin. 210.

The doctrine, in nearly the same words, is announced by Mr. Greenleaf. 2 Greenl. Ev., § 373.

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In *Bellingham's* case it is said that Lord MANSFIELD instructed the jury that insanity "ought to be proved by the most distinct and unquestionable evidence, * * * that in fact it must be proved beyond all doubt, * * * and that there was no other proof of insanity that would excuse murder or any other crime."

In *Oxford's* case, Lord LYNDHURST told the jury that "they must be satisfied, before acquitting the prisoner, that he did not know." etc., and then expressed his entire concurrence in the observations of Lord MANSFIELD, just quoted. 1 Russ. on Cr. 9.

The English authorities are uniform to the effect, that in order to sustain the defense of insanity, the jury must be satisfied that it exists, and that the proof must be clear and convincing, and we do not understand even the decisions of Lords MANSFIELD and LYNDHURST to go further than this, being satisfied that they only meant that the proof must be such as to exclude all reasonable doubt.

The Supreme Courts of Virginia, of Alabama, of Missouri, of Massachusetts, of Pennsylvania, of California, of New Jersey, and perhaps other States, have all held in accordance with the doctrine of this court in *Coleman's* case, that the burden of proof to rebut the presumption of sanity is on the defendant, and that insanity must be proved affirmatively, fully and clearly, and in such manner as to satisfy the jury. It is true that several of the courts referred to qualify their expressions by saying, in effect, that though it must be proved clearly and to the satisfaction of the jury, yet it need not be proved beyond a reasonable doubt. The limitation is entirely inconsistent with the original proposition. That which leaves reasonable doubt in the mind cannot be said to be clearly proved. A mind vexed with reasonable doubts about a fact cannot be satisfied as to the existence of such fact.

Proof beyond reasonable doubt means nothing more, in the oft-quoted language of Chief Justice SHAW, than "that the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it." *Webster's* case, 5 Cush. 320.

As said by another learned court, "all that the law requires is moral certainty, which is that the jury, whether the evidence be positive or presumptive, should be satisfied." *Giles v. State*, 6 Ga. 276.

Hair-splitting distinctions, under which some courts hold, that if
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the jury entertain only a reasonable doubt of the insanity, they must convict, but if they entertain reasonable doubt of the sanity of the prisoner, they must acquit, do not commend themselves to our judgment. Sanity and insanity are opposite conditions, exclusive of each other. A reasonable doubt as to insanity is a reasonable doubt as to sanity, and *vice versa*.

We can understand that as to indifferent questions, not primarily solved by any presumption of law, and which the jury must solve, one way or the other, there may arise a state of mind, in which, though not clearly convinced either way, the juror must find in favor of that side which is least doubtful. But on a question primarily, and until rebutted conclusively solved by a powerful presumption of law, we cannot understand how a jury can be justified in disturbing that existing status of legal satisfaction, upon evidence which merely raises a doubt, however reasonable.

The doctrine that the jury must be governed by the preponderance of evidence is vague, uncertain and unsatisfactory. The only evidence on the question of sanity or insanity, found in the case, might be evidence of the defendant, and although it might not be sufficient to raise more than the most shadowy doubt, the jury, under this doctrine, might be required to acquit. If on the contrary, the presumption of sanity is to be considered as an element of weight in favor of the State, we are then remitted to the original question, as to what weight of contrary testimony will constitute preponderance.

Much reflection has convinced us that the doctrine of the English courts, and of this and other American courts which have followed them, is most conformable to reason, principle and common sense.

The tendency of the opposite theory is, in our judgment, to emasculate our system of criminal justice, and to send juries adrift without any reliable chart or compass, upon a sea of doubt and speculation.

The phenomena of the human mind are so mysterious, the boundaries between its normal and abnormal conditions so shadowy, the transports of frantic passion and the powerful impulses of vicious tendencies are so nearly akin to temporary mental derangement, that unless juries hold fast to the wholesome presumption of sanity, responsibility for crime will be seriously impaired, and society will lie at the mercy of evil-disposed men, who, while too sane to be

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confined in asylums, can yet raise a doubt as to whether they are sane enough to be punished for crime.

We stand by the doctrine of this court in *Coleman's* case, that insanity, when set up as a defense to a criminal charge, must be "clearly shown by evidence which will satisfy the minds of the jury that the party was insane at the time of the commission of the offense;" and we know of no definition of "proof beyond a reasonable doubt," which is not fully covered by this statement. Certainly in this case, the judge meant, and sufficiently informed the jury that he meant, nothing more than this, because in other parts of his charge he distinctly told the jury: "Should the mental unsoundness of one or more of the accused, at the time of the commission of the offense, be established to the satisfaction of the jury, * * * you will acquit him or them;" and again, "if you believe, that at the time of the act they are accused of, they were not in such a mental condition as to create any responsibility on their part, * * * acquit them."

[Omitting other points.]

We remain satisfied of the soundness of the judge's rulings on all points, and the rehearing is refused.

Judgment accordingly.

NOTE BY THE REPORTER.—See *O'Connell v. People*, 87 N. Y. 377; s. c., 41 Am. Rep. 379. In *State v. Paulk*, 18 S. C. 514, the doctrine of the principal case was held, the court observing:

"We think the defendant has misunderstood the meaning and scope of the charge. The judge said, that where the defense of insanity is interposed, it must, in order to avail, be sustained by proof sufficient to bear down and overcome this presumption of sanity. The defendant undertakes to do this, and must do it, not beyond a reasonable doubt, but by such preponderance of testimony as to overcome the legal presumption of sanity which attaches to every citizen of sufficient age who has not been adjudged a lunatic. In civil cases the truth of the facts alleged depends upon the weight or preponderance of the testimony, but in criminal cases, by the humanity of the law, the guilt of the defendant must appear beyond a reasonable doubt, and this applies to all essential elements of the crime.

"As we understand the charge, Judge COTHRAN intended to apply this principle to the defense of the defendant, in the extracts above. He did not hold the defendant to the strict rule of proving beyond all reasonable doubt that he was insane when the act was committed, but he held him simply to the rule which prevails in civil cases, to-wit, that he should prove it by the preponderance of testimony, with the view to give the defendant the benefit of all reasonable doubt as to the facts required to be proved by the prosecution. He held the State bound to prove them to that extent and to the same end; when he came to the defense he relaxed the rule and required only a preponderance, stating distinctly that the defendant need not prove his alleged insanity beyond all reasonable doubt; on the contrary, if but the preponderance of testimony was on that side, let the defendant have the benefit of it; concluding his charge with the following direct and unmistakable instruction, 'That upon this issue (insanity), as upon every material issue in the case, and upon the whole case, the accused is entitled to the benefit of every reasonable doubt.'

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"Thus understood, we think the charge was in accordance with the position taken by appellant, in the line of the authorities cited, and certainly as favorable to the accused as it could have been put. If we have not misapprehended the position of the appellant, he has no cause of complaint as to the first exception, because he was permitted to invoke every reasonable doubt that might exist, which is all that he seems to have claimed or was entitled to demand.

"If however the position of appellant is, that the defendant having interposed insanity as his defense, the State was bound to prove, beyond all reasonable doubt, that he was not insane — in other words, that the mere interposition of the defense of insanity destroyed the legal presumption of sanity and at once shifted the burden of further proof, as to that question, on to the prosecution, with the responsibility of proving by some additional testimony, beyond all reasonable doubt, that the accused was not insane, and that the judge should have so charged, which from some portion of the argument it would seem that appellant claims — then we would say that such a position has no foundation in any principle or authority that we have been able to discover.

"It is true that the State is bound to make out all the essential elements of the crime beyond a reasonable doubt, and until this is done the accused is in no danger, but it would be stretching the doctrine of humanity beyond all precedent to require the State also to prove that the special defense set up by the accused is false beyond all reasonable doubt, in advance of any testimony offered to support it. In a special defense like insanity, the burden of proof rests upon the defendant, and if the defense is sustained not to the extent of a reasonable doubt, but by a preponderance, then the accused becomes entitled to a verdict of not guilty."

In *People v. Messersmith*, 61 Cal. 246, the trial court had charged: "That the burden of proving the existence of insanity rests upon the accused, and it follows that this fact must be satisfactorily established, and that by a preponderance of evidence." The court said on review: "The last instruction contains no erroneous proposition of law. It has been repeatedly held that where a person accused of crime relies on the defense of insanity, he is bound to establish it by such a preponderance of evidence that if the question were submitted to the jury in a civil case they would find him insane. *People v. Coffman*, 24 Cal. 280; *People v. M'Donell*, 47 id. 124; *People v. Wilson*, 49 id. 13; *People v. Walker*, 88 N. Y. 81; *People v. Ferris*, 55 Cal. 598. In other words, insanity, like any other affirmative defense relied on by a defendant in a criminal case, must be proven to the satisfaction of the jury. It is a fact; and a fact proven by a preponderance of evidence is a fact 'satisfactorily established.' As an expression, a preponderance of evidence is the equivalent of satisfactory proof. While therefore the instruction under consideration may be faulty in phraseology, it is, as a legal proposition, substantially correct."

STATE V. REVILLS

(24 La. Ann. 381.)

Criminal law — confession — when not voluntary.

The confession of an accused person while in the hands of his captives, not officers, and with a rope about his neck, is not free and voluntary, and is inadmissible in evidence.

CONVICTION of murder. The opinion states the case.

W. G. Wyly and Chas. M. Pilcher, for appellant.

J. C. Egan, attorney-general, for appellee.

POCHÉ, J. [Omitting other questions.] The next error charged has reference to the admission in evidence of the confession of the accused, made under the following circumstances :

Immediately after the homicide, which had caused great excitement in the parish, the accused had crossed over in the State of Mississippi, at a distance of about fifteen miles, where he was captured at a house in which he was spending the night, a short time before day, by a body of eighteen or twenty men, well armed, but not authorized by any requisition to make the arrest in Mississippi, nor sworn officers of the law, who immediately bound the accused, a boy about eighteen years of age, by tying a rope around his arms and around his neck, and at once began their march toward Carroll parish.

During the journey, the accused, after being warned that his statements touching the homicide might be used against him on his trial, made a confession of his guilt, which he repeated after he and his captors had reached the parish of Carroll.

We cannot conceive how it can be maintained that a confession made under those circumstances is a free and voluntary confession, within the meaning of the numerous adjudications of our own as well as of the courts of our sister States, on this important question.

The fact that the rope around the arms of the accused had been removed when he made the confession, unaccompanied by proof that the rope had been removed from his neck, is not sufficient to remove the irresistible impression that the accused, in the hands of a large body of armed men, who had taken him from the bed in which he was asleep, had tied him by the arms, put a rope around his neck, was not, and could not, be in a state of mind under which he could make a free and voluntary confession of guilt, uninfluenced by fear or not alarmed by the dread of his numerous captors.

We have examined and fully considered the numerous authorities relied on by the attorney-general in support of the admissibility in evidence of confessions made by prisoners while in custody of officers, while in jail, and even when in irons, but we have found no cases, and have no hesitation in asserting that none can be found,

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justifying the admission of the proof of a confession of guilt made by a young captive while in the hands of a hostile body of armed men, not known to him as officers of the law, and with a rope around his neck, and we shrink from the responsibility of establishing such a dangerous precedent.

The ruling of the judge on this point was erroneous, and manifestly to the great injury of the accused, and hence the case must be remanded.

It is therefore ordered, that the verdict of the jury be set aside, and the judgment of the lower court reversed, and that this case be remanded to the District Court for further proceedings.

So ordered.

HARRISON V. NEW ORLEANS & PACIFIC RAILWAY COMPANY.

(24 La. Ann. 462.)

Constitutional law — railway in street.

When the fee of a street is in the public, the legislature, either directly or through the municipal authorities, may authorize the construction of a steam railway therein.*

ACTION for injunction. The opinion states the case. The defendant had judgment below.

W. S. Benedict, for appellants.

Kennard, Howe & Prentiss, for appellee.

LEVY, J. Plaintiffs, about forty in number, property owners on Thalia street, in the city of New Orleans, complain that the said city, on the 3d of December, 1880, passed an ordinance, No. 6732, supplemental to ordinance No. 6695, granting the right of way through Thalia street to the New Orleans Pacific railway.

They allege that said ordinances are illegal and void, granting the right to said company to make tracks, switches, turnouts, sidings and structures of every kind, through said street to the river front, and to operate the same by steam. That they are the owners of

*See *Story v. N. Y. Elevated R. Co.* (90 N. Y. 122), 43 Am. Rep. 146

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property fronting on said street ; that the same is a public highway and absolutely necessary to enable them to make use of their property and enjoy the rights of ownership thereon ; that the narrow width of said street is such, that the city had no power to grant any right of way to any railway company, upon any street which would impair its usefulness to the public, or would enable said company to obstruct the street by permanent structures, inconsistent with its use as a street. If a track is laid thereon, it is too narrow, from Claiborne to Water street, to permit any vehicle to pass through, or stand upon said Thalia street, and no sufficient space would remain on either side for that purpose, that would enable plaintiffs to use said street as a public highway. That said city and company are attempting to pervert said highway from its original purpose, in an unauthorized and illegal manner. They aver that no authority was delegated to said city by the legislature, and the city is prohibited by article of the Constitution of 1879, from granting such right of way. That if said track is laid upon said street, it will destroy the value of plaintiffs' property, prevent every mode of locomotion on said street, and convert it into a private way for the benefit of said railway company, and plaintiffs will suffer irreparable injury. They allege that they have suffered damages in the sum of \$1,000, for which claim is made. They pray for an injunction restraining said company from laying any track upon Thalia street, from Claiborne to Water street, and from constructing any switches, turnouts, sidings and structures thereon.

An injunction was issued as prayed for.

By an amended petition the city of New Orleans was made a party to the suit.

The defendant railway company filed the peremptory exception of no cause of action, and subsequently an answer, admitting the adoption of the ordinance in question, averring its legality and otherwise denying generally all the allegations of the plaintiffs' petition.

There was judgment maintaining the exception, dissolving the injunction and dismissing plaintiffs' suit with costs. Plaintiffs take this appeal.

Practically, both the exceptions and the merits were covered by the evidence introduced on both sides, and the facts, as well as the law, are fully set forth. We therefore proceed to the consideration and decision of the case, on the evidence presented in the record

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and the points raised. High Injunc. 817, 839 ; Dill. Mun. Corp., §§ 661, 558-9.

We shall first consider the validity of the grant by the city of New Orleans, and whence it derived the right to make the same. "It has often been decided and is settled, that the legislature has the power to authorize the building of a railroad on a street or highway, and may directly exercise this power, or devolve it upon the local or municipal authorities." Dill. Mun. Corp., § 655 ; 27 Penn. St. 339.

Act No. 14 of session of 1876, grants to the N. O. P. Railway Company the right and power "to construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across or along or upon any waters, water-courses, river, lake, bay, inlet, street, highway, turnpike or canal within the State of Louisiana, which the course of said railways may intersect, touch or cross ; provided the said company shall preserve any water-course, street, highway, turnpike or canal, which its said railways may so pass upon, along, or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily," etc. The act of 1870, establishing the city government, gives to the municipal corporation the right to regulate and make improvements to the streets, public squares, etc.

Ordinance No. 6732, administration series of December 3, 1880, authorized and empowered said railway company "to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful, and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, across Claiborne canal into and through Thalia street to the river front, and to operate the same by steam or otherwise, for the transportation of cotton, tobacco, grain, merchandise and other freight, etc. ; provided there shall be but one track laid on Thalia street, from Claiborne to Water street," and further providing for the proper paving, grading, laying of the rails, etc., with a view to rendering said street passable and convenient to the public.

While admitting that "the fee of the streets is in the public, or the city for public use," plaintiffs contend that the city has no right to do any act which would embarrass the free use of the same, and that the use of Thalia street granted to the company does embarrass its free use and virtually and practically grants the exclusive use to the railway company.

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If the fee in the streets is in the public, or in the municipality in trust for the public use, the doctrine is settled that the legislature may authorize them to be used by a railroad company, without compensation to adjoining owners, or to the municipality, and without the consent, and even against the wishes of either. *Dill. Mun. Corp.*, § 556 ; 24 Iowa, 455 ; 36 Penn. St. 99.

In the case of *Commonwealth v. Erie and Northeast Railroad Company*, 27 Penn. St. 339, this question is elaborately and ably discussed ; that court through its learned Chief Justice BLACK, said : "The right of the supreme legislative power to authorize the building of a railroad on a street or other public highway is not now to be doubted. It has been settled not only in England (1 Barn. & Ad. 30), but in Massachusetts (23 Pick. 328), New York (7 Barb. 509), and in Pennsylvania (6 Wheat. 43). If such conversion of a public street to purposes for which it was not originally designed does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which results to the public for the cheap, easy and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood."

In *Williams v. New York Central Railway Company*, 18 Barb., the court said : "The use of a street by a railroad is one of the means of enjoying a public easement, and the only restriction upon its application is, that the use to be made of streets must not be utterly incompatible with, or subversive of the ends for which they were established; and if neither the Constitution nor the laws have been transcended in a given case, no individual can sustain a suit against a party exercising a right granted him by competent authority." "The aid of an injunction cannot be invoked to prevent, nor will an action lie to redress, a consequential injury necessarily resulting from the lawful exercise of a right granted by the sovereign power of the State, or authorized by competent municipal authority."

These doctrines are maintained. 12 Iowa, 246 ; 10 Bush, 288.

In the case last cited, it was held, that owners of lots bordering on streets hold them subject to the right of appropriation of the street to such public uses, promotive of commerce and business, as the general good of the city or town may require, provided such appropriation is not incompatible with the ends for which the street was established, as a public way for foot passengers, horsemen and

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the vehicles in ordinary use; and also, that private individuals seeking relief against a public nuisance must show that they suffer an injury distinct from that suffered by the general public, and that the injury is one that the public, in the promotion of the general interest, has not the right to inflict upon them without compensation. See also 87 Penn. St. 282 ; 3 Camp. 226.

In 50 N. Y. 206, "plaintiff's complaint alleged that defendant laid its track so near the sidewalk in front of his premises as not to leave sufficient space for a vehicle to stand, and that his family are thereby incommoded in leaving and returning to their residence, and the rental value of his premises is depreciated," and on demurrer, it was held that the complaint did not constitute a cause of action.

Dillon on Municipal Corporations, § 581, says: "But it is not every obstruction, irrespective of its character or purpose, that is illegal, even though not sanctioned by any express legislative or municipal authority." "The law on this point is well stated by the court in *Rez v. Russell*, 6 East, 427: 'That the primary object of the street is for the free passage of the public, and any thing which impeded that free passage, without necessity, was a nuisance. That if the nature of the defendant's business was such as to require the loading and unloading of so many more of his wagons than could be conveniently contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot.'

Same principles applied to congregation of carts in the public streets, for the reception of slops from a distillery. Denio, 525. To the keeping of coaches at a stand in the streets, waiting for passengers. 3 Camp. 226. To a timber merchant depositing timber in the street. 6 East, 230.

In *Pierce on Railroads*, 230, the following principles are laid down, which to our minds are sound and conclusive: "The improved method of conveyance may incidentally increase or depreciate the value of property on the highway; but provided the right of ingress and egress, of passage and repassage, is left reasonably free to the adjoining owner, the injury is one which the law does not recognize. A railroad laid out over or upon a highway or street, under proper legal authority, is within the legal intent of the original sequestration or dedication, and is not an invasion of private right entitling the owner to compensation, by virtue of the

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constitutional prohibition, provided it is so laid and constructed as not to be incompatible with the use of the highway in the other usual modes of passage and conveyance. It is not necessarily a nuisance, even in a large city, although it may, to a certain extent, interrupt the free passage of other kinds of vehicles; and unless unreasonable or permanently exclusive in its occupation of the highway, when authorized by competent authority. The statute which authorizes the structure to be laid legalizes the obstruction, and is a defense to an action or an indictment."

At page 337: "Such occupation is, indeed, necessarily exclusive while the railway carriages are passing, as two bodies cannot, under a physical law, occupy the same space at a time; such temporary exclusive occupation however is not peculiar to railway carriages, but attaches to all carriages while passing or stopping. At other times the space covered by the rails, and even the rails themselves, are open to general use."

"The circumstance that improved or different modes of enjoying the public use have affected injuriously or beneficially his remaining estate is but one of the incidents to which all property is subject in civilized life, not only from the use of highways, but from the use of adjacent land and the various changes in the community."

The authorities which we have above cited, and to which we have made reference, satisfy us that the judgment rendered in the court *a qua* is correct, and should not be disturbed by us. We are satisfied that the use of the street under the right granted to the railroad company cannot fairly be construed into an exclusive use, or as operating a permanent obstruction.

It is true there may be at times a temporary obstruction and delay and inconvenience to vehicles other than the railway carriages, but these are inconveniences to which individuals may be temporarily subjected, and to which the public interests are entitled. We find the street sufficiently wide for the use of the railway, and while the trains are passing or stopping along the street, ordinary vehicles will be somewhat restricted in their movements and passage, it is not such unreasonable delay and obstruction as would justify the court in enjoining the railway company from the enjoyment of the right which has been granted.

The judgment appealed from is affirmed at costs of appellants in both courts.

Judgment affirmed.

Peniston v. Chicago, St. Louis and New Orleans Railroad Company.

PENISTON V. CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD CO.

(24 La. Ann. 777.)

Carrier — railroad — duty in respect to passengers at eating stations.

Railway companies are bound to afford to passengers on long routes easy and safe modes and reasonable time for obtaining food, and safe ingress and egress to and from refreshment stations, whether controlled by the company or by others; and where a passenger sustains injury on returning from such a station to the train by want of sufficient light and the removal of the train without notice in his absence, the company is liable.

ACTION of damages for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

Horner & Benedict, for appellee.

L. E. Simonds, for appellant.

POCHÉ, J. Plaintiff, a passenger on a train of the defendant from Chicago to New Orleans, was injured while walking from an eating station to her train, on the defendant's road, and has recovered, at this suit, a verdict and judgment for damages in the sum of six thousand dollars.

The evidence is decidedly conflicting, but a careful reading of the record has satisfied us that the following facts are established:

On the 31st of January, 1878, while plaintiff, accompanied by her daughter and her son-in-law, were passengers on a train of the defendant, from Chicago to New Orleans, they came out of their car at about eight o'clock at night, at Hammond station, then a regular supper station on said road, according to its schedule, for the purpose of taking necessary refreshments.

The building in which meals are served is situated at a considerable distance from the railroad, and is reached by passengers who alight on the main track of the road, by crossing over a side track, and passing on a large platform, and thence through a narrower and covered platform which leads into the hotel.

On the arrival of the train, a torchlight burning on an elevated platform affords ample light to guide the steps of passengers to the

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covered platform where two or three lamps light up the way to the interior of the building.

After supper, and on returning to their train, plaintiff and her companions discovered that the torchlight had ceased to burn, and that there was no other light or signals to guide their steps securely through the large platform in front of the hotel to their train, and that there was no officer or employee of the company charged with the duty of pointing out to passengers the way from such platform to their train. Their train which they had left on the main track had been removed therefrom and placed on the side track lying next to the hotel, and another train, since arrived, was then occupying the position on the main track, where they had left their train on alighting for supper. They had received no information, officially or otherwise, of those changes operated while they were in the supper room.

Finding a train on the side track, and believing that to be a new train, which was standing between them and their train, they concluded to go around said former train, so as to reach theirs, and to do so they followed the platform fronting the hotel, and on which there was no light, and not noticing the termination of said platform on two steps of stairs leading to the main ground, plaintiff, who walked in the lead of her companions, fell to the ground, dislocating her ankle and fracturing her leg in two places, from which she suffered great pain, was confined to her room for four months, was compelled to walk on crutches for eight months, and from which injuries she has not yet recovered the free use of her limb.

Defending under a general denial, the corporation urges its want of responsibility, on the grounds :

1. That the hotel and platform are not the property of the company, but of another person, for whom defendant is in no manner responsible.

2. That the accident occurred through plaintiff's own fault, who should not have attempted to walk around the train on the side track, which was her train, the approach of which, from the eating station, was made easy and safe by lights burning in the covered platform and in a lunch stand situated at the rear end of said gangway; and who should have made inquiries concerning her train.

These propositions involve the discussion of the degree of care, attention and protection which railroad companies, as common carriers, owe to their passengers.

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In conveying passengers through long journeys, such as from Chicago to New Orleans, at great speed and with rapidity, a common carrier is required by humanity, as well as by law, to provide its passengers with easy modes and to allow them reasonable time for the purpose of sustaining life, by means of food and necessary refreshments. Hence it is, that on all such roads, arrangements are made to enable passengers to obtain at least two meals a day, and that announcement is made in every passenger train by employees of the road of the approach of a train to a station, where under arrangements with the company, meals are prepared for the convenience of its passengers.

It is well established in jurisprudence that railway companies are under the legal obligation to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches, etc., and it is well settled that any person injured, without fault on his part, by any dereliction of its duty in the premises by a railway company, can recover damages against the corporation for injuries thus received. *Cooley Torts*, 605, 606, 642; *Add. Torts*, § 245; *Shearm. & Redf.* 327, § 275.

This principle has been applied in a case where a passenger, an old lady, was put out at her destination, at a station where there was no light to guide her steps, and no employee of the company to show her the way out of the station grounds, and was injured in trying to go from the station to a friend's house, by falling from the platform. *Patten v. Chicago & Northwestern R. Co.*, 32 Wis. 528.

Under the same rule, a railway company was held responsible for injuries received by a passenger in walking from one of its trains to a transfer boat, by falling on a wharf on which there was not sufficient light. *Beird v. Conn. & Pass. Rivers R. Co.*, 48 Vt. 101.

In the enforcement of the same rule, a railway company was mulcted in damages in a case where a lady passenger, alighting from her train at her destination, and finding no safe and convenient platform leading to the highway, attempted to walk across three of the railroad tracks, and falling in a "cattle-guard" filled with snow, was run over and killed by another train of the same company. 13 Hun, 589; see also 56 Me. 244; 16 How. 469.

The obligation of furnishing, by railway companies, safe and easy ingress and egress to and from their platforms, has been extended so as to embrace cases of persons who were not passengers on their

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roads, but who came on business to their stations, and were injured by means of insufficient or defective platforms, such as a hackman who had transported passengers to a railroad depot. 59 Me. 183 ; see also *Jamison v. San Jose R. Co.*, 11 Cal. ; *Law v. Grand Trunk R. Co.*, 12 Me. 397.

Fully indorsing and concurring with this jurisprudence, we hold that the defendant company is legally bound to furnish to its passengers an easy and safe mode of going to and from its trains, and such eating stations as it may have provided for the wants and convenience of its passengers, and that for the purpose of enforcing this obligation, it is immaterial whether the eating station is owned and kept by the company or by another person, with an understanding with the company as to the time of preparing and furnishing the meals.

In our opinion, this obligation imposes upon the railway company the duty of having ample and sufficient lights, for meals furnished at night, to safely guide their passengers to and from the hotel or eating station, and in case trains are removed from one track to another during the meal, to inform, by employees, the passengers on their egress from the eating or dining-room, of the exact location of their respective trains.

We have given due and respectful consideration to the testimony of defendant's witnesses, who state that the platform was sufficiently lighted for all purposes needed by the passengers. These witnesses are the train conductor, two or three other railroad employees, the proprietor of the hotel, his lessee, who keeps it, and the local postmaster, who are all familiar with the place, are there at the arrival of every train, which they all designate by their numbers, are familiar with the rules of the company, and know that during the supper meal the south-bound train is moved to the side track from the main track, which is then occupied by the north-bound train. It stands to reason that the light which will be sufficient to enable such persons to move about in perfect safety will not be sufficient to safely guide a stranger, especially a woman who comes from a distant land, is aroused in her sleeping car by the sudden and shrill announcement by a brakeman of "twenty minutes for supper" and alights from her car in the brilliant torchlight, is shown to the hotel by numerous and zealous runners or servants, in great eagerness to secure her patronage, and who lose sight of her after receiving her money, and now that the torch is out, she is left alone, unaided

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and unprotected, to grope her way in darkness to her train, which is not now where she left it a few minutes before. Hence, it is but fair, reasonable and just to hold the railway company strictly responsible for the injuries which she received in her attempt to discover the location of the train on which she was a passenger.

Under the peculiar circumstances of this case, in which plaintiff is shown to have suffered for months excruciating pains, was forced to great expense in the employment of surgeons and nurses, and is yet in a crippled condition, we are not prepared to say that the verdict of the jury was excessive.

The district judge did not err in overruling defendant's motion for a new trial, urged on the ground of newly-discovered evidence, as it appeared that the witness on whose testimony it was based, could only corroborate defendant's other witnesses.

The judgment of the lower court is therefore affirmed, with costs.

Rehearing refused.

Judgment affirmed.

LEVY, J., absent.

STATE V. DISKIN.

(34 La. Ann. 919.)

Criminal law — admission by silence.

On a trial for murder it is error to admit evidence of an accusation of the prisoner made by the deceased in his presence, after his arrest, and of the prisoner's silence.

CONVICTION of murder. The opinion states the case.

J. C. Egan, attorney-general, for appellee.

W. L. Evans, for appellant.

FENNER, J. The defendant, convicted of murder, without capital punishment, relies for reversal of the judgment on two grounds: [Omitting the first.]

The defendant excepts to the ruling of the court admitting the

evidence of two police officers as to statements made by the person killed in the presence of the accused.

The evidence was to the following effect: After the accused was arrested on this charge, and while in custody, he was conveyed to the bedside of John Driscoll, the man killed, who was then lying wounded at the Charity hospital. A brother of the wounded man was also present, who was a corporal of police. The wounded man said to the prisoner, "Myles, you hit me, and shot me for nothing; own up." Whereupon Corporal Driscoll immediately said to the prisoner, "be quiet, be still." The witnesses said that they stayed in the room only from two to five minutes; that "the prisoner was not told that he had a right to speak, and did not speak a word while he was in the room."

It is not pretended that the declarations of the wounded man were made under a sense of impending dissolution. They were admitted solely on the ground that they were made in the presence of the accused, and to establish his implied admission of the truth thereof because of his silence and failure to deny.

Implied admissions from the tacit acquiescence of the defendant in the statements of others made in his presence only result when the circumstances are such as afford him an opportunity to act or speak, and would naturally call for some action or reply from a person similarly situated. Mere silence, while a party is held in custody under a criminal charge, affords no inference whatever of acquiescence in statements of others made in his presence. He has the undoubted right to keep silence as to the crime with which he is charged, and is not called upon to reply to or contradict such statements. Under such circumstances, it is held that the statements so made are not admissible against the prisoner, because they do not even tend to support the hypothesis of acquiescence. *Comm. v. McDermott*, 123 Mass. 440; s. c., 25 Am. Rep. 120; *Comm. v. Kenney*, 12 Metc. 235; *Comm. v. Walker*, 13 Allen, 570; *Bob v. State*, 32 Ala. 560; Whart. Cr. Law, § 696.

The instant case, where it appears that the accused was not only in custody, but was actually warned by a police officer to keep silence, can leave no possible doubt that the evidence was absolutely inadmissible. The record shows that it was considered and weighed by the jury, and no doubt influenced their verdict. After they had been out about nine hours they returned into court and asked whether the statements referred were admissible against the prisoner, and

the court instructed them that they "were admissible, and that the jury must consider it as they would any other fact; that is, the fact that John Driscoll had said so." And the court refused to give an instruction asked by the prisoner's counsel, that "as a matter of law, such evidence was entitled to very little weight," but charged that "it was admissible evidence, and that the jury were the sole judges of the credibility of witnesses, and of the weight of evidence and the importance to be attached to it, the same as any other fact."

We are constrained to conclude that this evidence thus improperly admitted, and thus shown to have been considered and weighed by the jury, vitiates the trial and conviction.

It is therefore ordered, adjudged and decreed, that the judgment and sentence appealed from be annulled, avoided and reversed, and that this case be remanded to the lower court, to be there proceeded with according to law.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. The State has applied for a rehearing on the ground that we have committed an error in stating that Corporal Driscoll said to the prisoner, "be quiet, be still;" that the words were addressed to the wounded man, and not to the prisoner.

The bill of exception is silent on that subject; but it is immaterial whether the words were addressed to the wounded man, because the declaration previously made by the latter to the prisoner, who was then in custody, could not be admitted in evidence, as it was not a dying declaration, and it is not pretended it was. Such a declaration could have produced an effect and be admissible only if it was a dying declaration.

From the fact that a declaration of guilt was made in the presence of an accused, it cannot be inferred, if the prisoner does not answer, that his silence is an admission, unless he was not in the custody of the law, and it was not in the course of a judicial inquiry. The declaration in this case could not have been admitted unless for the purpose of proving a confession of guilt on the part of the prisoner, to be inferred from his silence on the occasion.

Where a man is at full liberty to speak, and not in the course of a judicial inquiry is charged with a crime and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury. Such silence

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however cannot be treated as an absolute admission. The rule does not apply to silence at a judicial hearing. So it is as to statements made in the presence of one under arrest on a criminal charge, to which the prisoner makes no reply. Whart. Cr. Law, § 696; 13 Allen, 570, and other authorities; also, 12 Metc. 235; 123 Mass. 440. The statement in this case not forming part of the *res gesta*, and not being a dying declaration, should not have gone to the jury. Whart. Cr. Law, § 680.

Rehearing refused.

LEVY, J., absent.

HAMILTON V. RAILROAD COMPANY.

(34 La. Ann. 970.)

Water and water-courses — constitutional law — bridging navigable streams.

Under a legislative authority to construct a railway between certain points, the company may build, maintain and repair necessary draw-bridges across navigable streams, and will not be liable for temporary obstruction of the stream in the course of such work.*

ACTION for obstructing a river. The opinion states the case. The plaintiff had judgment below.

John T. Ludeling, for plaintiff.

F. P. Stubbs and *Boatner & Liddell*, for defendant.

POCHÉ, J. Plaintiff's object is to recover damages exceeding \$12,000, alleged to have been caused him by the defendant corporation, in consequence of an unlawful obstruction on the Boeuf river, a navigable stream, on which plaintiff was running a steamboat.

The answer is a general denial, coupled with the special averment that defendant, incorporated under the laws of this State, had the right of building, repairing and rebuilding necessary bridges over all streams along its line.

The case was tried by a jury, who found a verdict of one thousand dollars in favor of plaintiff, and both parties have appealed.

* See *Chicago v. McGinn* (51 Ill. 266), 2 Am. Rep. 235.

Our attention is called to numerous bills of exceptions taken by counsel on both sides, many of which can hardly be considered as serious, and are overruled *in globo*.

The objection to the introduction of J. W. Green's testimony, on the ground that the certificate of the governor of Georgia to the magistrate's signature and capacity had not been signed by him, but by his private secretary, was not well taken. The original document, which is annexed to the transcript, purports to have been signed by the governor, under the seal of the State, and is conclusive as to its veracity and authenticity.

The objection to the right of Green and Preston, shown to be experienced railroad men, to express opinions as to the time necessary to the building of a bridge, and other matters connected therewith, was properly overruled, the witnesses, being experts, were competent to give their opinions of the subject-matter of their examination.

Some irrelevant evidence was admitted, but it will not be considered by us.

As the whole case is to be reviewed, both on the law and on the facts, we deem it unnecessary to express a formal opinion on the exceptions urged by defendant to the judge's charge to the jury, as it will be virtually disposed of in our statement of the law governing the case.

The testimony is somewhat conflicting, but after a careful examination of the record, we find the following facts to be fully established under the evidence.

A drawbridge of the company, crossing Bœuf river, a navigable stream, having been, on inspection, found decayed, rotten and unsafe for the use of a railroad, the company determined to rebuild the bridge in the summer of 1880.

The superintendent of the road then entered into a contract with an experienced bridge-builder, who undertook to build the bridge during the summer months, when Bœuf river was usually too low for purposes of navigation.

Owing to an overflow of the surrounding country, caused by inundations from the Mississippi river, lasting until the end of April, the work could not be begun before July, after the complete subsidence of the high water.

In order to accelerate the structure, and to avoid any obstruction to navigation, the company stipulated with the contractor for the

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preparation of the necessary materials at their workshops in Monroe, and for the transportation to the spot as soon as the stage of the water would permit the structure of the bridge.

In order not to suspend travel and through trains, and acting on long experience, which taught the fact that the navigable season on that river usually began at the end of December of each year, and ended in July following, and that the construction of a temporary stationary bridge immediately adjoining the bridge under progress of construction would not interfere with navigation, the company built such a temporary structure, on which they ran their trains. But beginning in August, and ending only in December following, a very rainy season set in, and swelled the waters of the river to almost an unprecedented height for the summer season, and materially impeded the progress of the work, which was, in consequence thereof, not completed till late in December, when under ordinary circumstances, it should and would have been terminated in September or early in October, long before the resumption of navigation on the river as a channel of commerce.

By reason of the incessant rains which impeded the work, an unusually early stage of navigable water on the river was obtained in November, when plaintiff undertook to run his boat, in his accustomed trade, which was mainly above the bridge, and the passage was obstructed by the temporary stationary bridge of the defendant, and this obstruction lasted during a time in which he could have made four trips between New Orleans and the head of navigation on Beuf river.

Under this state of things, the company did every thing in its power to accelerate the construction of its bridge, and to remove the obstructions to navigation, by adding to the constructor's force a gang of its own bridge laborers, by working on Sunday, and by trying even to do night work.

Now, we hold that under its charter, by which it was empowered and authorized to construct, make and maintain a railroad from a point on the Mississippi river opposite Vicksburg, thence west to the line of the State of Texas, *via* Monroe and Shreveport, the company had the undoubted right to build all the necessary bridges across any navigable stream in the course of its line, and that the legislature had the power to confer such right.

"The grant of power to construct a railway between two points carries authority to cross navigable waters, if that is reasonably

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necessary in the construction of the work." Redf. Railw. 322, note; 5 Allen, 221.

It is also unquestioned, that "the State legislatures have unlimited power to erect bridges and railways, and make any other public works across navigable waters, subject only to the paramount authority of the national government." Redf. Railw. 323; *People v. Rensselaer & Saratoga R. Co.*, 15 Wend. 113; 30 Am. Dec. 33; *Gilman v. Philadelphia*, 3 Wall. 713; *Penn. v. Wheeling Bridge*, 18 How. 432; *Blackbird Creek March Company's case*, 2 Pet. 245; *Worth v. Junction R. Co.*, 5 McLean, 425.

These principles, resting on foundations of reason, as well as of law and authority, giving the right to build necessary bridges, necessarily imply not only the right, but the duty of the company to keep and maintain them in such repair as the public safety may require. Hence, the legal right of the defendant company to rebuild the bridge in question, which has been pronounced unsafe by competent authority.

We shall now consider whether, [under the circumstances disclosed by the record, the company can be held responsible for the damages occasioned by it to the plaintiff, through the delay which it met in the construction of that bridge, which delay became unavoidable, under the unexpected, unforeseen and unprecedented rains which prevailed during the months of August, September, October, November and December of that year.

This proposition involves the consideration of the question of a party's responsibility in damages for injury done to another, in the pursuit of a legal right or in the performance of a lawful act. And both on reason and authority the inquiry must be answered in the negative.

The company had the right to build the temporary bridge, in order to facilitate the structure of the new bridge, and for the purpose of continuing its through trains. If the bridge had been completed, and the obstruction to navigation removed before the resumption of trade on the river, as had been contemplated, and as it was reasonably expected, no one could have complained, as no one could have been injured or damaged. The delay was caused by accidents and circumstances over which the company had no possible control, and for which it cannot be held responsible in justice or in law.

In the case of the *Memphis & Ohio R. Co. v. Hicks*, 2 Sneed,

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427, it was held, "that the provision in the charter of a railway company, authorizing it to bridge a navigable stream, provided that the navigation of the stream shall not be obstructed, is not violated by a temporary obstruction of the stream by scaffolding, etc., in the construction of the bridge."

The present case presents circumstances clearly entitling the defendant to the protection of the rule of "*damnum absque injuria*," and we are therefore compelled to exonerate it from any responsibility for the damages resulting from the temporary obstruction to the navigation of Bœuf river, in its attempt to rebuild a necessary bridge. *Ransom v. Labranche*, 16 La. Ann. 121; 11 id. 711; 15 id. 559; 27 id. 442; *Week's Absque Injuria*, §§ 48, 46.

This conclusion eliminates from discussion the question of the damages which plaintiff may or not have suffered from the obstruction of the river, which is thus shown not to have been unlawful.

It is therefore ordered, adjudged and decreed, that the verdict of the jury be set aside, and the judgment of the lower court annulled, avoided and reversed; and it is now ordered, that plaintiff's demand be rejected, and his action dismissed at his costs in both courts.

ON APPLICATION FOR REHEARING.

FENNER, J. It is proper to state that in this case the evidence establishes that Bœuf river, the stream across which the bridge was built, lies, as a navigable stream, wholly within the limits of the State of Louisiana. Although the upper portion of the stream itself lies in Arkansas, it is not navigable, and has never been navigated as high up as the Arkansas line.

The authority of Congress over navigable streams is an incident of the power to regulate commerce among the States, and only affects rivers which are highways of commerce between different States. As to streams which are navigable only within the limits of a single State, the authority of its legislature is complete. *Penn. v. Wheeling Bridge Co.*, 18 How. 432; 1 Redf. Railw., § 78, notes, and authorities cited.

This makes it clear, that in the instant case the authority derived from the legislative action of the State did not conflict, under any view, with any paramount authority of the Federal government.

Rehearing refused.

DELANEY V. ROCHEREAU.

(84 La. Ann. 1128.)

Agency — liability of agent to third person for negligence.

An agent having the care of real estate is not liable for an injury sustained by a third person by reason of the agent's neglect to keep the same in safe repair.

ACTION of damages for negligence producing death. The opinion states the case. The defendant had judgment below.

Jos. P. Hornor and F. W. Baker, for appellant.

C. E. Schmidt, for appellee.

BERMUDEZ, C. J. This is an action to hold agents liable to third parties for injury sustained in consequence of an alleged dereliction of duty, or non-feasance on their part.

The plaintiffs sue to recover \$25,000 as damages, for great bodily injuries and suffering, resulting in the death of their minor son, occasioned by the giving way, in September, 1879, of the gallery of a house in this city, owned by a non-resident, but at the time in the possession and under the control and administration of the defendants, as his paid agents. The defense was a general denial. From a judgment in favor of the defendants, the plaintiffs have appealed.

The evidence shows the following facts : The house in question and the adjoining one, both under the same roof, belonged at the time to Dennis Coutreaud, who then resided in France. A. Rochereau & Co., the defendants, were his agents, having control as such of the property. Half of the property was rented and occupied. The other half was not rented and was vacant. There was in front of the entire building, which was two story, a balcony, as wide as the sidewalk. It needed repairs. The defendants knew of its condition. The vacant tenement had been permitted by the agents, on two or more occasions not long before the calamity, to be used for purposes of amusement. On the 13th of September, a party, a raffle and a dance, was given in the unoccupied portion of the building, without the authority or knowledge of the defendants, by an

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individual, who had procured a key from a neighbor and taken possession of the premises. He gave the entertainment in the upper story, charging an admission fee. The son of plaintiffs, an intelligent lad thirteen or fourteen years old, and a girl, in whose company he kept, on payment of the fee, obtained entrance. There were from thirty to thirty-five persons at the party. At about half-past ten o'clock in the night, a number of persons, twelve or thirteen, among whom was young Delaney, moved, it is inferred rushed, to the gallery, and were upon it when it gave way, and all who were on it fell with it. The young man was found unconscious on the sidewalk, with iron braces and some flooring upon him. He was removed from the spot to his home. The injuries received consisted in a concussion of the brain and fractures of the parietal and occipital bones of the skull, as well as bruises on the arms and legs. He is said to have been insensible to the end. He received all possible surgical and other attention, but died early in the morning.

The contention is, that as the injuries received caused intense suffering, and as they were occasioned by the falling of the gallery, which was in very bad condition, to the knowledge of the defendants, who, as the agents of the owner, were bound to keep it in good order, and who without justification neglected to do so, their firm and each member thereof are responsible *in solido* for the damages claimed.

The theory on which the suit rests is, that agents are liable to third parties injured, for their non-feasance.

In support of that doctrine, both the common and the civil law are invoked.

At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done, the agent, in the latter case, being liable to his principal only. For non-feasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct.

Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obliga-

tions resting upon him in his individual character and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men.

An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations toward third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible.

The whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrongdoing, therefore in an act, directly injures a stranger, then such stranger can recover from the agent damages for the injury. Story Agency, 308, 309; Story Bailm. 165; Shearm. & Redf. Neg. 111, 112, ed. 1874; Evans Agency, notes by Ewell, 437, 438; Whart. Neg. 535, 78, 83, 780.

It is an error to suppose that the principle of the civil law, on the liability of agents to third persons, is different from those of the common law. It is certainly not broader.

While treating of "negligence in discharge of duties not based on contract," which had not previously been considered, Wharton, beginning the third book of his remarkable work on Negligence, says :

"The Roman law in this respect rests on the principle that the necessity of society requires that all citizens should be educated to exercise care and consideration in dealing with the persons and property of others. Whoever directly injures another's person or property by the neglect of such care, is in *culpa* and is bound to make good the injury caused by his neglect. The general responsibility is recognized by the Aquilian law, enacted about three centuries before Christ, which is the basis of Roman jurisprudence in this relation. *Culpa* of this class consists mainly in commission, *in faciendo*. Thus, an omission by a stranger to perform an act of charity is not *culpa*; it is *culpa* however to inadvertently place ob-

stacles on a road, over which another falls and is hurt ; to kindle a fire by which another's property may be burned ; to dig a trench which causes another's wall to fall." He subsequently states that the following are cases in which no responsibility can possibly attach :

" When a man does every thing in his power to avoid doing the mischief, or when it is of a character utterly out of the range of expectation, the liability ceases and the event is to be regarded as a casualty.

" If the injury is due to the fault of the party injured, the liability of the party injuring is extinguished.

" *Quod quis ex sua culpa damnum sentit, non intelligitur sentire.*" Pomponius. Whart. Neg. 780, 300.

The allusion made by certain writers to the Roman law, which gives a remedy in all cases of special damages, must necessarily be understood as referring to instances in which the wrong or damage is done, or inflicted by an actual wrong-doing or commission of the injuring party.

The article of the French Code, 1992, from which article 3003 of our R. C. C. derives, which is to the effect that the agent is responsible not only for unfaithfulness in his management, but also for his fault and mistake, contemplates an accountability to the principal only, and this by reason of the assumption of responsibility by the acceptance of the mandate. How indeed can an agent be responsible to a third person for the management of the affairs of his principal, or for a mistake committed in the administration of his property ? The responsibility for fault is likewise in favor of the "*mandant*" alone.

The Napoleon Code, article 1165, contains the formal provision that agreements have effect only on the contracting parties ; they do not prejudice third parties, nor can they avail them, except in the case mentioned in article 1121. This last article refers to stipulations in favor of *autrui*, which become obligatory when accepted.

The Code of 1808 contained a corresponding article, but that of 1825 did not ; neither does the Revised Code of 1870. It must not be concluded however that the omission to incorporate the provision in the subsequent legislation must be considered as a repudiation of the doctrine.

The distinguished compilers and framers of the Code of 1825 ac-

count for the omission to reproduce, because the provisions were already embodied in other articles, and might be deemed to be exceptions to the undoubted rule that contracts can only avail, or prejudice the parties thereto. *Projet du Code de 1825*, 264.

Quod inter alios actum est, aliis neque nocet, neque prodest. § L. 20, *De instit. Act*; see also, Pothier on *Oblig.*, Nos. 85, 87; Domat, L. 1, t. 16, § 3, No. 8; L. 2, t. 8; Troplong *Mand.*, No. 510; Duranton 10, No. 541; Toullier 6, 341; Toullier 7, 252, 306; Demolombe 25, No. 38; Laurent 10, No. 377; Larombière, 1, 640.

That such is the case was formally recognized by the Court of Cassation of France, in the case of Thomassin, decided in July, 1869, and reported in part 1 of Dalloz J. G. for that year. The syllabus in the case is in the words following: "*Le mandataire n'est responsable des fautes qu'il commet dans l'exécution du mandat, qu'envers le mandant.*" See also, J. G. Vo. Obl., Nos. 878 *et seq.*, and Vo. Mandat, No. 213.

The case of *Beaugillot v. Callemor*, 33 Sirey, 322, far from expounding a doctrine antagonistical to that prevailing, as was seen, at common law, and which we consider as well settled likewise under the civil law, is fully confirmatory of the same. It was the case of an agent condemned to pay damages for obstructing, by means of beams, a water-course partly closed up by masonry, and thus causing an overflow, in consequence of which a hay crop was damaged. The plea of *respondeat superior* did not avail. The court well held that the commission of the act constituted a quasi offense, in justification of which the mandate could not be set up.

This anterior view of the case relieves the court from the necessity of passing upon the other questions presented, relative to fault, trespass, contributory negligence, suffering and damages.

Judgment affirmed with costs.

Judgment affirmed.

Haney v. Trost.

HANEY V. TROST.

(84 La. Ann. 1146.)

Slander — malice — interest.

The defendant's wife, a stockholder in a street railway company, informed her husband that she had heard persons boast that a car of the company driven by the plaintiff was "a good dead-head car" for them, and the defendant informed the foreman of the company, who thereupon without investigation or notice dismissed the plaintiff. *Held*, that an action of slander would not lie, there being no proof of actual malice.

ACTION of slander. The opinion states the facts. The plaintiff had judgment below.

A. E. Billings and R. K. Cutler, for appellee.

Cotton & Levy, for defendant and appellant.

POCHÉ, J. This is an action in damages for slander. Plaintiff complains that in consequence of a malicious and false statement, made by the defendant to the foreman of the Magazine Street Railroad Company, he was discharged from his employment as car driver for said company, and avers that he has thereby suffered damages in the sum of \$5,000.

The answer was a general denial, and defendant appeals from a verdict and judgment of \$1,000 against him.

The charge made against plaintiff was, that he was in the habit of allowing persons to ride on his car without paying fare, and on the strength of that charge, plaintiff was discharged as car driver.

But the evidence fails to prove that the statement was made by plaintiff with malicious intent, or with any desire to injure plaintiff, either in his reputation or in the matter of his employment.

Malice is the essence of slander, and it must be proved, either by direct testimony or by irresistible implication, from the nature of the language and conduct of the defendant. *Boulleinet v. Phillips*, 2 Rob. 365; *Gilbrot v. Palmer*, 8 La. Ann. 130.

The record shows that defendant, whose wife was a stockholder in the railroad company, heard persons boast that the car driven by plaintiff was "a good dead-head car" for them, and that he there-

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upon called on the foreman of the company, and made the charge against the plaintiff, who was the nephew of defendant's first wife, and against whom he had no ill-feeling. Without warning or further investigation, the foreman at once discharged the driver, informing him of the reasons which led to his discharge. It may be that the foreman acted too hastily, and should have watched the driver, or given him some warning, but defendant surely cannot be held responsible for such haste or apparent unfairness, and it nowhere appears that his purpose was to have plaintiff discharged from his employment.

His wife, being a stockholder in the company, and directly interested in the proper administration of its affairs, it was defendant's undoubted right to protect her interests by imparting the information of a damaging practice entailing loss on the company and its stockholders, with the manifest intention of bringing about a correction of the abuse. The fact that in making his statement to the foreman, he informed him of the connection of his wife with the company, is a circumstance which unmistakably explains his conduct, and with other circumstances, satisfies our minds that the charge was made with good motives and for justifiable ends.

We have searched the record in vain for any evidence tending directly or indirectly to show that in making the report to the company, the defendant was actuated by malice or ill-will to plaintiff, in particular, or to his fellow-man in general, and hence, he cannot be held in damages for the language charged to him.

Although we should be, and are always, loth to disturb the verdict of a jury in such cases, yet we must do our duty when their finding would work glaring injustice, as would be the case in the present instance.

The views which we have expressed obviate the necessity of considering other defenses urged in the case.

It is, therefore, ordered that the verdict of the jury be set aside, and the judgment of the lower court reversed; and that plaintiff's demand be rejected, and his action dismissed, at his costs in both courts.

So ordered.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

SPALDING V. HENSHAW.

(80 Ky. 55.)

Surety—action by creditor against, for money delivered to him by principal.

When a principal debtor delivers to his surety money to pay the debt to the creditor, he may re-demand it before payment, and the creditor gets no lien on it and can maintain no action for it against the surety.

ACTION by creditor against surety for money delivered to him by the principal to pay the debt. The opinion states the case. The plaintiff had judgment below.

I. A. Spalding and W. P. D. Bush, for appellant.

A. Duvall and D. H. Hughes, for appellee.

PEYOR, J. The appellee, George Henshaw, held the note of John B. Payne, with George Payne as surety, for the sum of \$1,000, payable in twelve months from the 7th of September, 1857. In March, 1857, John Payne desiring to pay the note, gave to George Payne, the surety, the sum of \$1,000 for that purpose, and took from him the following receipt :

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"Received of J. B. Payne one thousand dollars, which I promise to pay to George Henshaw, in gold, to pay a note that George Henshaw holds on him, and I am surety to.

"(Signed)

GEORGE PAYNE"

In May, 1861, John B. Payne, the surety, George Payne having failed to pay this money to Henshaw, instituted an action against him, in which it is alleged that he paid over to George Payne the \$1,000 on the 25th of March, 1857, to be paid to Henshaw, and took his receipt therefor; that the latter had failed to pay the money to Henshaw as directed, and still refuses to do so, or to refund to him, John B. Payne, the money, although often requested so to do. He set up other claims against George in the same action that have no connection with the matter in controversy, with the exception that a general attachment was levied on the property of George Payne to secure the various demands against him.

John B. Payne, it seems, was embarrassed with debt, as well as George, and I. A. Spalding, as administrator of one Powell, and other parties, brought three actions against John B. Payne, and obtained attachments that were levied on the estate of John, and garnisheed the claim of \$1,000 owing by George Payne. George Payne died, and the action of John Payne was revived against his administrator, and in April, 1868, there was a judgment rendered in favor of John Payne against the administrator for the \$1,000. There were various actions consolidated in the effort to make the debts due by John and George Payne, and in April, 1868, \$500 of the judgment against George Payne's administrator, and in favor of John B. Payne, was directed by the court to be paid to the attorneys of John Payne, or they were given a lien to that extent.

Henshaw in March, 1862, brought his action, and recovered a judgment against George Payne on the note for the \$1,000 executed by him and John, and in October, 1869, filed a petition to be made a party to the action of John Payne against George Payne, alleging in the original petition and the amendment that he had recovered a judgment against George Payne on the note, the delivery over by John to George of the \$1,000 to pay it, and the recovery by John Payne of George Payne's administrator on the receipt for the \$1,000, and its collection by I. A. Spalding, the attorney of John Payne, who then, as is alleged, had it in his possession. He sued

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out an attachment, and garnisheed this money in the hands of Spalding.

Spalding filed a demurrer and answer. The answer alleges, that as administrator of Powell, he had garnished or attached all these funds owing to John Payne, to satisfy the claim of Powell. That after applying all these claims the debt to the Powells remained unsatisfied; and that he had, in addition, purchased of the heirs of Powell their interest, and was entitled to the fund. The claim of Powell's administrator against John B. Payne was large, and the action to recover, with attachments issued and levied, had been pending long before the attempt on the part of the appellee, Henshaw, to subject the fund arising from the judgment against George Payne, based on the receipt for \$1,000.

It is manifest from the facts contained in the record that the court below was of the opinion that the execution of the receipt by George Payne to John B. Payne, in which the former agreed to pay the \$1,000 to the appellee Henshaw, gave to the latter a lien or an equity superior to all other creditors. Both John and George Payne were the obligors in the note to the appellee, and the fact that John had furnished to George Payne, the surety, the money to enable him to satisfy the debt, did not increase or diminish their liability to Henshaw (the appellee), or give to him any additional security for his debt. He already had George Payne bound as surety on the note, and if he had instituted an action against him could have recovered only the \$1,000. This sum he did recover of George in an action on the note in 1862, and if he had instituted an action after this to have recovered on the receipt, by reason of the agreement between John and George Payne, the judgment on the note as to George could have been pleaded in bar, as he was not entitled to two judgments for the same debt.

There was nothing to prevent an execution on the judgment rendered on the note, or a resort to all incidental remedies to enforce it. The appellee at no time agreed to look to George Payne alone for the debt, and seems not to have known until October, 1869, that George had executed the receipt, in which he promised to pay the \$1,000 then secured to him in discharge of the note. It is insisted however that the receipt was in effect an obligation by George Payne to pay the appellee the \$1,000, and although he had recovered a judgment on the original note against George, yet as the money was collected on an obligation belonging, or for the benefit of the

appellee, that he is entitled to it. Adopting therefore the theory maintained by the appellee for the purpose only of making the inquiry suggested by it, and regarding George Payne, who received this money, as an entire stranger to the original note, and his promise made in no other manner than as found in the receipt, the appellee is not entitled to recover. He at no time ratified, accepted, or confirmed the action of John Payne and George with reference to this money, and in fact never heard of it, so far as this proof shows, until after John had recovered it back from George Payne, and after it had been subjected, or a lien created upon it by the creditors of John Payne for the payment of his debts. George Payne received the money as the agent only of John Payne, and the latter, before its acceptance by the appellee, or his agreement to look to George for payment, could have revoked the direction or order to pay it to the appellee, and this he certainly did by instituting his action and recovering a judgment for the money upon the alleged ground that his agent had failed to pay it to the appellee.

He might as the surety, under certain circumstances, have held it for indemnity; but we are discussing this case as if George was in no manner liable, except on his promise to pay the money to Henshaw.

That Henshaw might have maintained an action against George, if he had not been already liable, is settled by several adjudged cases in this court. A promise of A. to B., upon a sufficient consideration, to pay C. a sum of money, may be enforced by C.; but when the parties making the contract rescind or cancel it before its acceptance by the third party for whose benefit it is made, the contract is at an end. There is no trust in such a case as this so as to make the contract irrevocable, or facts authorizing the presumption that the party benefited has assented to the agreement. Here the appellee could have instituted an action at any time to recover on the original note, as he did do, and recovered a judgment. Taking the name of George Payne from the note, and it was a delivery by John Payne to George of \$1,000 to pay this debt, and the debtor had the right at any time, before its acceptance by the creditor, to demand its payment back to him, to be appropriated, if he desired, for other purposes.

In the case of *Davis v. Calloway*, 30 Ind. 112, in an agreement between Calloway and Kiplinger, Calloway agreed to pay Davis \$100.

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It appeared from the second paragraph of the petition that the parties had rescinded the agreement. The court said: "Until the acceptance by Davis of the promise by Calloway, the parties to the agreement had the right to rescind."

In the case of *Basset v. Hughes*, 43 Wis. 319, in discussing a kindred question, the court said: "After knowledge of and assent to such engagement by the person for whose benefit it is made, his right of action on it cannot be affected by a rescission of the agreement by the parties thereto."

In 33 N. H. 171, it is said: "A party who deposits money with another to be appropriated for the benefit of a third person, being under no legal obligation to appropriate it, has a right to countermand the appropriation, and recall the money at any time before it is appropriated, or before a privity has been created between the depository and the beneficiary that amounts to an appropriation of it."

In Story on Bailments, § 210: "In cases of mandates, when the thing is to be delivered to a third person, if the latter has no vested interest in it, the bailor may revoke the bailment at any time."

There is no pretense in this case of any release of the original note; but on the contrary, after the receipt was executed, a judgment was obtained upon it, and not until John Payne had recovered a judgment against George Payne's administrator for the failure to pay this money over, did the appellee attempt to assert any claim apart from the original note against George Payne; and if he had, no recovery could have been had, as he then had a judgment in his favor against George for the \$1,000. No lien existed on the fund, and none could have been enforced, as against these creditors, as we have already shown, if George Payne had stood in no other light than as a mere depository of the money. It had been recovered from him by John Payne; and Spalding, in his representative capacity, and in his individual right, insists that he has already appropriated it. The case must go back, and permission given the appellant to file his amended answer, and the questions as to the priority of liens, by reasons of the various attachments and judgments rendered, can be heard and determined.

The judgment is reversed, and cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

Louisville, Cincinnati and Lexington Railroad Company v. Commonwealth.

LOUISVILLE, CINCINNATI & LEXINGTON RAILROAD COMPANY
v. COMMONWEALTH.

(80 Ky. 142.)

Criminal law — nuisance — excessive speed of railway trains at highway crossing — contributory negligence.

It is an indictable nuisance for a railroad company to run trains across highways at a speed of fifteen or twenty miles an hour, without warning. The doctrine of contributory negligence is inapplicable. (*See note, p. 470.*)

PENAL action for nuisance. The opinion states the case.

M. J. Dudley, for appellant.

P. W. Hardin, attorney-general, for appellee.

HARRIS, J. This was a prosecution for a common-law nuisance, charged to have been committed by the appellant at a crossing of the turnpike and its railroad, by habitually running its trains at an unsafe and unreasonable rate of speed, and so rapidly as to endanger, hazard, and injure persons travelling upon the turnpike, without giving warning signals or taking precautions to avoid injuring such persons by approaching trains.

A trial was had, and a verdict and judgment rendered against the appellant for \$500, from which it prosecutes this appeal, and asks a reversal of the judgment because of erroneous instructions and an improper exclusion of evidence from the jury, and a refusal to sustain the motion in arrest of judgment.

The instructions asked by the appellant, and rejected by the court, in effect negative the legal sufficiency of the alleged and proven facts, and apply to this character of case the doctrine of contributory negligence.

This court said in the case of the *Louisville & N. R. Co. v. Commonwealth*, 13 Bush, 390, that a railroad company "may lawfully run its trains at any reasonable rate of speed, but it is bound to take reasonable precautions to prevent the enjoyment of its privilege from injuring those crossing its road upon public highways."

This general rule must be considered the settled law of this

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State, and being sound in principle, we perceive no reason for departing from it.

Tested by it, the indictment states a public offense, and substantially sets forth a public nuisance, and the motion in arrest of judgment was therefore properly overruled.

The evidence shows that the turnpike is daily used in travel by a large number of people passing on horseback and in vehicles over the crossing. Some days as many as one hundred and fifty people thus travel over it. The turnpike is the main thoroughfare from the city of Covington to the town of Independence, whither the public officers, attorneys at law and others go to transact the ordinary official business of the county, and that the appellants ran as many as four trains a day over the crossing at the rate of fifteen to twenty miles an hour, and the formation of the country at the crossing prevented persons approaching it along the pike on one side of the railroad from seeing trains until they came within twenty-four to fifty steps of the crossing. This evidence clearly establishes the fact that the safety of the numerous persons passing over the crossing requires that warning signals should be given of the approach of trains.

The jury, by their verdict, in effect found that the appellant habitually failed to give such signals, and as they were necessary to the safety of the public from danger of approaching trains, the appellant was legally convicted, unless the finding of the jury is without evidence to support it. There is evidence of failure to give any warning signals on several occasions, and the testimony introduced by appellant to establish the custom of ringing the bell or sounding the whistle on the approach of trains to the crossing does not show that such warning signals were universally given, and it lacks some of the elements of certainty. And the jury having found that the evidence was sufficient to establish that dereliction of duty, we are not inclined to disturb their verdict, as it is not without evidential support, as the frequency and rapidity of the passing trains require the best warning reasonably within appellant's power to be given, by the use of the ordinary signals for such purposes to the public of the proximity and approach of such trains.

The instructions given were in accord with the law, and applicable to the facts of this case; but those refused did not contain the law suited to the facts and quality of this accusation.

Where a nuisance is public, annoying the members of the com-

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munity generally by the careless and incautious exercise of a hazardous and dangerous business in their midst, the contributory negligence of any or all of them furnishes no excuse or defense to a prosecution for any injury to the public generally.

The greater the peril to which the public is exposed the more precaution should be taken by those in control of the power productive of the hazard ; and whatever may be the conduct of individuals, whether incautious, negligent or reckless, neither railroads nor any others are thereby exempted from the duty of so exercising their rights as not unnecessarily to imperil the safety or impair the privileges of the public, nor can they escape responsibility for neglect of duty on the ground that individual members of the community unnecessarily imperil their own safety.

The principles of law found in section 473, 2 Greenleaf's Evidence, which appellant's counsel insist are applicable to a public nuisance, relate to an action by a private individual for an injury to his person or property growing out of acts which might amount in fact to a public nuisance, and as the action is not for an injury to the public, the doctrine of contributory negligence applies. Where the injury sought to be remedied is to the rights of the individual alone, he ought not to recover damages if his contributory carelessness caused the injury, and it cannot make any difference, so long as the individual complains in his own right, that the injury affects the whole community ; but the rule is different when the public is the complainant.

Then what was merely a civil injury to the individual becomes more — a public offense — which, being impersonal, cannot be excused by the contributory acts of persons.

The appellant offered to prove the absence of casualties on other roads conducted in a more populous community, and at intersections of highways more generally used than the crossing of the turnpike in question, and the evidence was excluded, and we think correctly, because it was irrelevant to the issue in this case, which was confined to the appellant's guilt or innocence of the offense charged in the indictment, and illustrated none of the legitimate questions involved in the trial.

Therefore the judgment must be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Cincinnati R. Co. v. Commonwealth*, 80 Ky. 137, an indictment was supported for leaving a hand-car at a highway crossing, on a single occasion

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with buckets and clothing hung on it, by means of which horses were frightened. The court said:

"To secure the free use and enjoyment of a public road, it is necessary that it be always open and unobstructed. The offense of obstructing it is not therefore determined necessarily by the length of time the thing that worketh hurt, inconvenience, or damage to the public continues, or by the number of times it may be repeated; nor is it necessary, in order to constitute the offense, that actual injury be suffered by any person. It is no more necessary that a public road shall be repeatedly, continuously, or habitually obstructed by a person to render him guilty of the offense of a public nuisance than that any other violation of law shall be in order to make the offense complete. But subject to the exemptions arising from absolute necessity and accidental causes before mentioned, the offense is committed when by actual obstruction or impediment a public road is rendered by any person inconvenient or dangerous to pass.

"To secure the reasonable and proper use and enjoyment of the public road by the public, and of the railroad by its owners, each must be required to observe the maxim of law that every person is restricted against using his property to the prejudice of others. And as it is plain that the railroad and the public road cannot at the crossing place both be occupied and used at the same time, even partially, the law, for manifest reasons, makes it the duties of persons travelling upon the public road to stop until an approaching train or car passes that point. But the public, on the other hand, is entitled to the unobstructed use of the public road at the crossing place when it is not actually occupied, or about to be occupied, by moving trains or cars.

"To concede to the owners of railways the right to stop their trains or cars at the place the public road crosses the railroad would not merely render the latter inconvenient and dangerous, but in many cases useless. Not even business necessities will authorize the owners of railroads to thus obstruct the public roads.

"In this case the hand-car appears to have been stopped and left stationary at the crossing place, and was an actual impediment and obstruction of the public road; and as such obstruction was intentionally created, and did not arise from accidental causes, the offense of a public nuisance was complete. The Commonwealth was not confined to the day alleged in the indictment, but had the right to prove the commission of the offense on any day within twelve months before the finding of the indictment; and although it was not necessary to prove that the road was obstructed more than one day or upon more than one occasion, the defendant was not prejudiced thereby, because the jury was instructed by the court that they were authorized to find the defendant guilty of only one alleged nuisance."

In *Paducah and Elizabethtown R. Co. v. Commonwealth*, 80 Ky. 147, an indictment was supported for the railroad's maintaining the rails at a highway crossing so high above the surface of the highway as to endanger persons and animals.

COMMONWEALTH V. OVERBY.

(80 Ky. 206.)

Bail — when excused from surrender by re-arrest.

Bail in a criminal case are discharged from liability by the arrest of the principal upon the same charge in the same State by the Federal authorities, and his incarceration in another State.*

* See *State v. Horn* (70 Mo. 406), 35 Am. Rep. 487.

ACTION on a bail bond. The opinion states the case. The defendant had judgment below.

P. W. Hardin, attorney-general, for appellant.

Feland & Sebroe and *G. R. Champlin* for appellee.

LEWIS, C. J. On the 19th of November, 1880, appellee executed a bail bond for the appearance of John H. Overby in the Christian Circuit Court at its ensuing February term to answer the charge of passing a counterfeit United States treasury note ; but the defendant having failed to appear, the bond was forfeited, and summons issued against appellee.

In his response he alleged the following facts which are conceded : That on the day following the execution of the bail bond, Overby was arrested by an officer of the United States, and carried before a United States commissioner, and by him held to appear and answer at the next term thereafter of the United States Circuit Court held in the city of Louisville, the same charge for which he had been required to appear and answer in the State court ; that failing to give bail, he was committed to the jail of Jefferson county, where he remained until February, 1881, when he was indicted, tried and convicted in the United States court for the offense, and sentenced to confinement in the penitentiary of the State of New York for the term of five years.

The court below having overruled the demurrer to the response, and dismissed the proceeding against appellee, the Commonwealth prosecutes this appeal.

By the terms of the bail bond in such cases, the bail undertakes that the defendant shall appear in court at the time and place designated, to answer the charge upon which he is in custody, and at all times render himself amenable to the orders and process of the court in the prosecution of the charge ; or if he fail to perform either of these conditions, that the bail will pay to the Commonwealth the sum at which the penalty is fixed.

But it is expressly provided by law that the bail may, at any time before the forfeiture of the bond, surrender the defendant to the jailer of the county in which the prosecution is pending, and be thereupon exonerated ; and for the purpose of surrendering him, the bail at any time before judgment against him, and at any place

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within the State, may arrest the defendant ; or by an indorsement upon a certified copy of the bail bond, may direct the arrest to be made by any peace officer of the State, or by any other person over twenty-one years of age, designated in the indorsement ; and it is also provided that if before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond.

There is therefore in the bail bond an implied undertaking on the part of the Commonwealth that the bail shall not be hindered or prevented by herself, or by any other authority within the limits of the State, in surrendering the defendant before the forfeiture of the bond, and the further undertaking that the Commonwealth has the power through her peace officers to arrest the defendant if within the State, and will so arrest him at any time before judgment against the bail, when he shall so direct.

It has accordingly been held by this court that when the Commonwealth, by her own act, prevents the appearance of the defendant in discharge of the bail bond or recognizance, she should not enforce the penalty against the bail for non-compliance. *Alquire v. Commonwealth*, 3 B. Monr. 349; *Kirby v. Commonwealth*, 1 Bush, 114.

Although in this case the bail was not deprived of his right to surrender the defendant, and thus to become exonerated by the Commonwealth, he was effectually prevented exercising that right, as was the defendant prevented appearing in discharge of the bail bond by the United States government ; and in our opinion, it does not make any difference whether the non-appearance of the defendant in compliance with the bail bond be caused by the Commonwealth or by the United States government ; for the authority of neither can be resisted by the bail or by the defendant, and in both cases the bail is deprived of the aid and protection of the Commonwealth, to which, under the contract, he is entitled.

Upon principle, as well as according to the weight of authority in this State, the facts set forth in the response by appellee constitute a sufficient defense to the proceeding against him, and the demurrer was properly overruled.

In the case of the *Commonwealth v. Terry*, 2 Duvall, 383, it was held by this court, that in a proceeding against the surety upon a forfeited recognizance, it was a sufficient defense that the defend-

ant, being a soldier in the Federal army, was refused a furlough, and by reason thereof, was unable to appear in discharge of the recognizance; and in the case of the *Commonwealth v. Webster*, 1 Bush, 616, it was held that the defendant, having been arrested by a provost marshal and taken from the county where the prosecution against him was pending, the bail should not be made liable upon the bail bond, because he was, by the United States officer, deprived of the power to surrender the defendant.

But the case of the *Commonwealth v. House*, 13 Bush, 680, though the facts are not fully set forth, appears to be somewhat in conflict with the two just referred to. In that case it is conceded that if the Commonwealth, before the time stipulated for his appearance, arrests the principal and detains him at another place, so that he cannot appear at the time and place mentioned in the bail bond, the bail is exonerated; but it is intimated that the bail would not be exonerated when the principal is arrested and detained by the United States government.

Perceiving no reason why the bail should be exonerated in the one case and not in the other, we must adhere to the doctrine announced in the two cases in 2 Duvall and 1 Bush, *supra*, and overrule the case in 13 id., *supra*, so far as it is inconsistent with this opinion.

But there is another ground upon which the bail in this case should be exonerated.

The object of a bail bond or recognizance is to secure the appearance of the defendant in the court having jurisdiction, that he may answer the charge against him, and if convicted, render himself in execution thereof.

Manifestly, the defendant in this case could not have been tried and convicted, even if present, in the Christian Circuit Court, after having been tried and convicted of the same offense in the United States Circuit Court. For though tried by the United States court, still it was the same offense for which he was held to answer in the State court, denounced alike by the laws of the United States and of this State.

The judgment is affirmed.

Judgment affirmed.

Commonwealth v. Louisville and Nashville Railroad Company.

COMMONWEALTH v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(80 Ky. 291.)

Sunday — running railway trains on.

It is lawful for a railway company to run trains for passengers, mails and express freight, on Sunday. It is a "work of necessity."*

PENAL action for Sabbath breaking. The opinion states the case. The defendant had judgment below.

P. W. Hardin, attorney-general, for appellant.

Lyttleton Cook, for appellee.

PRYOR, J. This action was instituted in the name of the Commonwealth against the Louisville and Nashville Railroad Company for an alleged violation of section 10, article 17, chapter 29, of the General Statutes which provides: "No work or business shall be done on the Sabbath day, except the ordinary household offices, or other work of necessity or charity. If any person, on the Sabbath day, shall himself be found at his own or any other trade or calling, or shall employ his apprentice or other person in labor or other business, whether the same be for profit or amusement, unless such as is permitted above, he shall be fined not less than two nor more than fifty dollars for each offense. Every person or apprentice so employed shall be deemed a separate offense. Persons who are members of a religious society who observe as a Sabbath any other day in the week than Sunday, shall not be liable to the penalty prescribed in this section, if they observe as a Sabbath one day in each seven, as herein provided."

Section 2 of title 1 of the Criminal Code provides: "A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth of Kentucky, or in the name of an individual or corporation if the whole fine be given to such individual or corporation. The proceedings in penal actions are regulated by the Code of Practice in civil actions." Under this provision of the Code these proceedings were had.

*See *Phila., etc., R. Co. v. Lehman* (56 Md. 209), 40 Am. Rep. 415.

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In the first paragraph of the petition it is alleged, in substance, that on the 3d day of April, in the year 1881, it being the Sabbath day, usually known as Sunday, the defendant (the railroad company) did run and operate over its railroad track, in the county of Jefferson, a certain train, consisting of one locomotive engine, baggage car, and three several passenger coaches. Said train was at the time running and transporting, for the profit of the defendant, passengers and their baggage, merchandise, express baggage, and the United States mails into the State of Kentucky for sundry points within the State, and through said State into other States. That for the purpose of operating said train on the day aforesaid the defendant did hire and employ certain persons to work and labor on the train as engineers, brakemen, and baggage-master (naming them), and for which labor they were paid their wages.

It was further alleged that it was not a work of necessity or charity, and that those employed by the company, or either of them, did not observe as a Sabbath any other day in the week than Sunday.

The second paragraph relates to the running, on the same day, of cars transporting live stock, goods, and merchandise destined for various points in Kentucky, Tennessee, etc.; and by reason of the several violations of the statute, the Commonwealth claims that the said railroad company became liable to pay fines amounting to \$350, viz.: one fine of fifty dollars for running and operating the train, and six other fines of fifty dollars each for the employment of the persons engaged in the work and labor on the same.

The defendant, in answer to the petition, states that the running and operating its train was necessary on the day alleged for the public service, and to enable it to discharge its duties and obligations to the public, and to comply with its contract as a carrier for hire, engaged in transporting passengers and the mails of the United States, and in carrying live stock, goods, merchandise from one point to another in and out of the State. That the hire and employment of the laborers on its trains was then and now necessary for the safe and proper conduct of its business as a carrier. That the act in question, if applicable to the defendant, is in violation of the State and Federal Constitutions. An issue was formed, and the cause submitted to the court without the intervention of a jury. Several witnesses testified for the defense to the effect that it was absolutely necessary for railroad companies engaged in transporting

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passengers, freight, and the mails in and out of the State to run their trains every day, including the Sabbath. That the public convenience and the necessities of trade require that this should be done. That the delays to passengers in travelling from one section of the State to the other, or from the different sections of the country, if this was not done, would prove vexatious and expensive, and sometimes ruinous, and that the transportation of live stock, fruits, vegetables, ice, fish, game, and, in many instances, merchandise, required speedy and rapid delivery in order to preserve it, and protect the rights of those interested in it.

The sole power of determining the policy of such an enactment as is brought in question is vested in the legislative department of the State government by the Constitution, and unless the passage of this Sunday law, as it is usually termed, is inhibited by some provision of that instrument, it must be sustained. The legislative will is supreme on all such questions, and when not abridging the civil rights or privileges of the citizen, must be held to be constitutional. The constitutionality of similar enactments has been passed on and sustained by courts of last resort in nearly every State of the Union, and this concurrence of opinion, together with a reference to former decisions of this court on kindred subjects, conclude, in our opinion, the constitutional question raised, and we will discuss the application of the statute alone to the acts of this company, entertaining no doubt as to the constitutionality of the law.

The meaning to be attached to the words "or other work of necessity," found in the act, must control the decision of this case. and if we are to attach to those words their scientific or physical meaning, that is, that the action of the company was inevitable or could not have been otherwise, its liability would at once be fixed, as it might have stopped its trains or declined to receive freight or passengers unless upon the agreement that the delay in transportation should relieve it from responsibility. Under such a ruling the cooking of food or the feeding of stock on the Sabbath might be dispensed with, and every other necessity in the way of labor that was not indispensable to man's existence.

Could this have been the legislative intent when using such language in the statute, or shall we not interpret the words as having a legal meaning designed to apply to the wants of the citizen, adapting the language in its construction to the manners, habits, wants and customs of the people it is to affect; and in many cases, the

rights and duties of those charged with a public or private duty, and the obligations they are under to others must also be considered in determining the character of labor falling within the statutory prohibition. It is argued in the case of *Sparhawk v. Union Passenger Railway Company*, 54 Penn. St. 401, that it was not intended by such acts to exempt the party charged from the prohibition of the statute because his labor was a work of necessity to others, but it must be a work of necessity to him who does the labor. We do not so construe the statute. If so, why protect the apothecary who sells his medicines for the relief of the patient, or the dairyman who furnishes the milk for his customers, or the hotel-keeper who furnishes his guests with food and lodging? It is the exigency of the object to be accomplished that determines, to a great extent, the means to be resorted to for that purpose. No safer rule, we think, can be established, or any better definition given of the word necessity, than is found in the decision cited as adverse to the views therein expressed, and that is: "The law regards that as necessary which the common sense of the country, in its ordinary mode of doing business, regards as necessary." The change in the habits and customs of the people, and the mode and character of transportation and travel, makes that a necessity at this day that half a century since would not have been so regarded.

It is impossible, and certainly not practicable, to draw the line of distinction with certainty between works of necessity and such labor as falls within the denunciation of the statute, and we are not disposed to venture so far as to attempt to place a limit to the meaning of the word necessity when applied to the wants of man. In the case of *McGatrick v. Wason*, 4 Ohio St. 566, it was held "that works of necessity are not limited to the preservation of life, health or property from impending danger. The necessity may grow out of, or indeed be incident to the general course of business, or even be an exigency of a particular trade or business, and yet be within the exemption of the act. Hence the danger of navigation being closed may make it lawful to load a vessel on Sunday, if there is no other time to do so."

In the case of the *Phil. & W. & B. Railroad Co. v. Steam Tow-boat*, 23 How. 209, the court said: "We have shown, in our opinion delivered at this term, that in other Christian countries, where the observance of Sundays and other holidays is enforced by both church and state, the sailing of vessels engaged in commerce, and

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even their lading and unlading, were classed among the works of necessity which are excepted from the operation of such laws. This may be said to be confirmed by the usage of all nations, so far at least as it concerns commencing a voyage on that day."

Railroad companies, as carriers of passengers, furnish at this day almost every accommodation to the traveller that is to be found in the hotels of the country. His meals, as well as sleeping apartments, are often furnished him, and to require the train, when on its line of travel, to delay its journey that the passenger may go to a hotel to enjoy the Sabbath, where the same labor is required to be performed for him as upon the train, or to require him to remain on the train and there live as he would at a hotel, would certainly not carry out the purpose of the law, and besides, the necessity for reaching his home or place of destination must necessarily exist in so many instances as to make it indispensable that the train should pursue its way. So of the trains transporting goods, merchandise, live stock, fruits, vegetables, etc., that by reason of delay, would work great injury to parties interested. A private carriage, in which is the owner or his family, driven by one who is employed by the month or the year to the church in which the owner worships, or to the home of his friend or relative, on the Sabbath, is not in violation of the statute. So in reference to the use of street railroads in towns and cities on the Sabbath day. Those who have not the means of providing their own horses or carriages travel upon street cars to their place of worship, or to visit their friends and acquaintances; and such is the apparent necessity in all such cases, that no inquiry will be directed as to the business or destination of the traveller, whether in the one case or the other, nor will an inquiry be directed as to the character of the freight being transported; nor will the person desiring to hire the horse from the livery stable be compelled to disclose the purpose in view in order to protect the keeper from the penalty of the law. Such employments are necessary, and not within the inhibition of the statute.

The common sense, as well as the moral sentiment of the country, will suggest that the merchant who sells his goods, or the farmer who follows his plow, or the carpenter who labors upon the building, or the saloon-keeper who sells his liquors on Sunday, are each and all violating the law by which it is made penal to follow the ordinary avocations of life on Sunday. The ordinary usages and

customs of the country teach us that to pursue such employments on the Sabbath is wrong. Every man can realize the distinction between pursuing such avocations and that of transporting the traveller to his home, or the pursuit of such employments as must result from the necessary practical wants of trade.

This statute is only a civil regulation enacted from motives of public policy, and to discuss it in a religious point of view would be to attribute to the legislature the exercise of a power it does not possess; that is, the power to enforce the performance of religious duties.

Judgment affirmed.

HARGIS, J., dissenting.

ARNOLD V. COMMONWEALTH.

(80 Ky. 300.)

Contempt — power to punish summarily.

When the statute provides no mode of punishing a contempt, the court may punish it summarily, without indictment.*

PROCEEDING to punish contempt. The opinion states the facts. The defendant appealed.

P. B. Thompson, for appellant.

P. W. Hardin, attorney-general, for appellee.

PRYOR, J. In August, 1880, during the progress of a trial in the Jessamine Circuit Court, under an indictment against James H. Arnold for murder, the appellant, Isaac H. Arnold, with force and arms, and in open court, obstructed the proceedings in the case, and was committed to the jail of Jessamine county to await the action of the grand jury. On the next day a rule was issued against the appellant, requiring him to show cause why he should not be fined and imprisoned, or both, at the discretion of a jury, for the contempt of hindering and obstructing the court and its

*See *Ex parte Wall*, 107 U. S. 265.

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proceedings by forcibly assaulting the attorney for the Commonwealth while engaged in open court in the discharge of his official duties.

The appellant appeared, pleaded not guilty, and the jury empanelled to try the issue said he was guilty, and fixed his punishment by a fine of \$1,000, and imprisonment for twelve months. After going to jail he replevied the fine as authorized by the statute, and execution having issued on the replevin bond, upon a written notice to the attorney for the Commonwealth, he moved to quash the replevin bond and the execution.

First. Because the rule issued was in violation of article 4, section 5, of the Constitution, not being in the name of and by the authority of the Commonwealth of Kentucky, and against the peace and dignity of the same.

Second. The judgment is void under article 13, section 13, of the Constitution, because no indictment was found by the grand jury against him.

Third. Because the replevin bond is made to bear interest.

[Omitting first and second grounds.]

The solution of the entire question depends however upon the disposition made of the second objection urged by counsel, viz. that the appellant should have been first indicted by a grand jury of the county where the offense was committed. That the assault made upon the attorney for the Commonwealth was an offense at the common law cannot be denied, but we do not understand that this is the gravamen of the offense, but it consists in the contempt offered the court by making the assault during the progress of the trial.

It is conceded that the court has the inherent power to punish by fine or imprisonment for such a contempt, and it might be added the legislature has no power to take from a court the power to protect itself against such flagrant contempts as was offered the court in this particular case; and to sanction the exercise of such legislative action would in effect defeat the administration of justice, and particularly in cases where the Commonwealth is seeking a conviction for the violation of its penal or criminal laws. The exercise of such a power by the judicial tribunals of the country is essential not only in the attempt to enforce the laws for the prevention of crime, but for the protection of each and every citizen in the enjoyment of his property, and its exercise is not now ques-

tioned. The right to punish for contempt, without the intervention of a jury, was recognized, and is fully established by the rule of the common law, and when the exercise of the power is admitted, the fact that a jury may be called in to aid the court in determining the quantum of punishment to be inflicted is in no manner objectionable. While the right to punish is with the court, we are not prepared to say that it is not subject in some degree to legislative control; but on the contrary, we are inclined to adjudge that a mere arbitrary discretion on the part of the judge may be limited; but an attempt by legislation to deprive the courts of the inherent power of protection against assaults and indignities would be disregarded.

By section 1 of article 27 of chapter 29, General Statutes, it is provided that "a court shall not, for contempt, impose upon the offender a fine exceeding thirty dollars, or imprison him exceeding thirty hours, without the intervention of a jury." By section 2 of same article it is provided: "In all trials by jury arising under this article, the truth of the matter may be given in evidence." And by section 3 it is provided: "If any person shall, with force and arms, enter any court-house or room in which a court is held during the time such court shall be in the discharge of its official duties, or if he obstruct or hinder by any means such court from discharging its duties, he shall be fined or imprisoned, or both at the discretion of a jury."

It is maintained that such an offense is made a crime by this statute, and the court has no power to try the accused for it without the intervention of a grand jury.

That it is a contempt of court is not denied, but as the statute provides no mode of trial, or of bringing the party before court for trial, it is urged that it must be by an indictment. There was no necessity of providing a mode of trial. The manner for conducting such a proceeding was established by the rule of the common law, and has been followed by the courts of this country, that is, by an attachment or rule against the party charged with the contempt to appear and answer, and punishment, if the party was guilty, determined by the court without the intervention of a jury. All the legislature has said is, that the tribunal to whom the contempt is offered shall not, by way of punishment, exceed a fine of thirty dollars, or imprisonment exceeding thirty hours, without the intervention of a jury. The rule of the common law has been

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modified by giving to the party charged the right to a trial by jury, and the judge required to have a jury empanelled, when in his opinion, the indignity offered requires greater punishment than that he is authorized to impose by the statute. This change was for the protection of the citizen, and instead of restricting his rights under the laws or Constitution of his country, is an attempt to place him beyond the exercise of a power that could otherwise inflict punishment at discretion. The question of the right of trial by jury in cases of contempt has been often raised, but always denied. See *Ex parte Grace*, 12 Iowa, 208; *Neel v. State*, 9 Ark. 259; *State v. Matthews*, 37 N. H. 450; *Patrick v. Warner*, 4 Paige, 397; *People v. Bennett*, id. 282.

The questionable power in this case is the right of the legislature to regulate the action of the court in regard to the punishment for contempt, and certainly when the appellant has had a jury to pass upon his case he ought not to be heard to complain. While the citizen cannot be thus summarily punished for a crime, the right to punish in a summary way without a jury, for contempt, is as ancient as the proceedings in courts of justice.

Judgment affirmed.

HAWKINS V. RAGSDALE.

(80 Ky. 352.)

Marriage — divorce — statutory construction.

Where a statute provides that divorce bars curtesy and dower, it embraces a valid divorce obtained in another State.

ACTION of dower. The opinion states the case. The defendant had judgment below.

G. H. Towery, for appellant.

Ken. Chapeze, for appellee.

HINES, J. A. S. Hawkins and appellant were husband and wife, residing in this State, where the husband owned certain lands.

Henry v. Koch.

Appellant abandoned her husband, who subsequently removed to the State of Indiana, where he obtained a divorce from the bonds of matrimony, by proceeding on constructive service, and in compliance with the laws of that State. A. S. Hawkins afterward married in the State of Indiana, and has since died. This is an action by appellant to recover dower in the lands lying in Kentucky, and owned by A. S. Hawkins at the time of the separation and divorce. The court below dismissed the petition, from which judgment this appeal is taken.

A. S. Hawkins being a *bona fide* citizen of Indiana, and resident therein at the time of the proceedings in which the divorce was obtained, the decree severing the bonds of matrimony determines the status of the parties, but does not by its own force affect the right to property in this State. That being true, appellant has dower in the land, unless she is deprived of it by the statute law of this State. Section 14, article 4, chapter 52, of the General Statutes, which is the same as the Revised Statutes, provides that "a divorce bars all claim to curtesy or dower."

We are of the opinion that this statute was intended to apply to all valid divorces no matter by what sovereignty granted. In its terms it is general, referring to the fact of the severance of the bonds of matrimony, and not to the tribunal by which the dissolution is declared.

Judgment affirmed.

HENRY V. KOCH.

(80 Ky. 391.)

Easement — in wall, on another's land.

Where a wall of a house stands wholly upon the land of another, and is essential to the support of the house, the latter cannot remove or impair it, both owners having bought from the common owner and with knowledge of the situation of the wall.

ACTION for injunction. The opinion states the case. The defendant had judgment below.

J. T. O'Neal, for appellant.

Henry v. Koch.

James S. Pirtle, for appellee.

PRYOR, J. George Anderson, being the owner in fee of a lot of ground in the city of Louisville, upon which he had erected certain buildings, severed the lot and buildings upon it by conveyances made at the same time to one Doup and Wright. There were two rooms, or rather two houses, on the lot, divided by a partition wall at the time of the conveyance, Doup acquiring by his purchase one of the rooms and Wright the other. They purchased, as stated, of Anderson, who was the sole owner, in the year 1871. The lots fronted on Washington street, between Floyd and Preston streets. The appellant, Mrs. Henry, purchased the lot sold Doup, and the appellee the lot sold Wright. The conveyance from Anderson to Doup describes the lot as running 183 feet east of Floyd street, and thence with Main street eastwardly 26 3-4 feet; thence westwardly 204 feet to Washington street, etc., to have and to hold the same, with all the appurtenances thereon, to the second party and his heirs forever. The agreed facts show conveyances were made by Doup and Wright to these parties, and that they entered into possession. It also appears that the boundary dividing the two lots or houses is a straight line, and that the wall separating the two buildings is all on the lot owned by the appellees, leaving a strip of at least five feet of appellees' lot beyond the wall, and adjacent to appellant's lot. Appellant's house is a two-story metal-roofed brick building; but according to the proof, is of but little value. The appellee desired to remodel his building, and to convert it into a residence, or rooms suitable for that purpose; and as the wall stood entirely upon his lot, with a space of five feet of ground in addition belonging to him, lying between the wall and the lot of the appellant, he began the improvement. The appellant's house had for its support this partition wall, with the roof, rafters and joists all resting upon it, and was so constructed by Anderson at the time he sold to Doup and Wright, the vendors of these parties. No change had been made in the building affecting the rights of the parties in any manner until shortly before the institution of this action, in March, 1880, when the appellee took the roof from appellant's house to the extent that it covered the strip of ground between the wall and the real division line; cut loose every other rafter supporting the roof; took up the floor of the second story of appellant's room over the strip, and proceeded to make various openings in the

wall for the purpose of making his improvements, leaving the inside of appellant's house entirely exposed. Notice was given the appellant, by a postal card, of the intention of the appellee to make the change. The work began on the 29th of March, and this action in equity obtaining an injunction to prevent the injury, was obtained on the 12th of April.

The chancellor, upon the facts stated, dissolved the injunction, upon the ground that the wall was not a party wall, and no irreparable injury could result to the appellant from the conduct of the appellee, as she could build a wall on her own lot to support the roof, and if wronged by the appellee, her remedy was at law and not in equity.

It is not necessary to determine whether the wall dividing the two houses is or not in a strict legal sense a party wall. It is an easement or servitude claimed by the appellant by reason of the grant, and the appellee had no right to deprive her of the use and enjoyment of this right without her consent. The reason the appellee gives for the illegal acts complained of is, that he desired to obtain light and air for the convenience of the building in its altered condition. He first created the necessity for light and air by remodelling his dwelling, and in order to obtain it, undertook the destruction of appellant's property. When Anderson sold and conveyed this property to Doup, under whom appellant claims, the wall was the support of appellant's building, and it will not be pretended that this vendor could have torn off the roof of appellant's house that he might enjoy the benefit of the strip of ground that is now claimed belongs to the appellee. If he would be estopped from forcibly taking possession of appellant's property that he might enjoy his own, we cannot well see how the grant by him to another could confer such a right.

It was not the conveyance to Wright, under whom the appellee claims, that gave the right, because the conveyance to Doup and Wright created this easement. The fee-simple was in Wright, and by him passed to the appellee; but they took the title with the servitude upon it. They could see the building, its mode of construction; and the fact that the building of the appellant had its joists, rafters, and roof resting on this wall must have been known to all.

It is not a question of title or even notice, as the parties must be presumed to have knowledge of the real boundary; but the ques-

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tion is, was the use or continuance of the easement necessary for the support of the structure?

The parties, as said in the case of *Lampman v. Milks*, 21 N. Y. 505, "are presumed to contract with reference to the condition of the property at the time of the sale, and neither has the right, by altering arrangements then openly existing, to change materially the relative value of the respective parts."

This appellant or her vendor, when they purchased this property, took it with all the benefits and burdens as appeared at the time of the sale to belong to it. They well knew—all the parties—that the building could not stand with the wall removed, and the right to remove it by the appellee is based on no other ground than that he is the owner of the fee. This would apply to all servitudes, as they cannot exist without the recognition of a dominant estate. The use of the fee cannot be made so as to destroy the enjoyment of the easement, and the elementary books say that one of the recognized modes of creating an easement is, where the owner of an entire estate sells a portion, the purchaser takes his purchase with the burden and benefits as they exist, or rather, as they appear. "So, if one proprietor erect two adjoining houses with a wall between them for the purpose of supporting both buildings, and the same is necessary for that purpose, and he then conveys, with metes and bounds, by a line running through the center of the wall, the grant would carry not only what was within the limits described, but pass as an easement appurtenant to the grant, a right of support of the house by the entire wall, as well that not included as that within the limits mentioned in the deed." Washburn on Easements, 336.

In the case of *Prichard v. Pine*, an English case found in 2 American Law Register, 180, in discussing a question somewhat analogous as to the rights of purchaser from a common vendor, it is said: "The right of mutual support remains, and the circumstance of the title of the houses having been separated by one act at one time, or by different acts at different times, can make no difference in this respect."

In the case of *Robbins v. Barnes*, Hor. 121, and cited in the case of *Lampman v. Meek*, it was held, "that when one of two adjoining houses was originally built in such a manner that one overhung a portion of the other, although this overhanging was originally wrongful, yet if both houses should come afterward to be owned by one person, and he should sell them to different per-

sons without alteration, the purchaser of the overhanging house would thereby acquire the right to maintain his house in that condition, and when it decayed, to pull it down and build another of the same description. The houses must be taken as they were at the time of the conveyance."

The appellant has a right, in common with the appellee, to the use and enjoyment of this wall for the support of her house, and it is unreasonable to say, that because the appellee owns the fee, and may be deprived of such use of his ground as may be necessary for its improvement, or for his own comfort, that he can tear down and destroy appellant's building. If he can take away part of the flooring and roof he may demolish the entire building by removing the wall, and this, from the beginning he has made, will likely be done unless the chancellor interferes. It is unnecessary to inquire whether the appellant has a remedy at law, and to determine that because she could maintain an action of trespass or recover damages, she must look on and see her house destroyed, would in effect invite the appellee to finish his undertaking. When the injury is irreparable, or permanent ruin to property will ensue from the wrongful act, a court of equity will interfere by injunction to prevent the injury. See *Hahn v. Thornberry*, 7 Bush, 403.

It is said in the opinion below that the injury is not irreparable, because the appellant can build a wall of her own. The injury we would regard as irreparable, when the consequence is the destruction of the building by reason of the act of appellee; and that another wall will have to be erected, or house built, is not only conclusive as to the extent of the injury being sustained, but of the right of the appellant to ask the chancellor for relief. The enjoyment of an easement, says Story, will be protected or secured by a court of equity. 2 Story Eq. Jur. (12th ed.), § 927, p. 110.

It matters not in a case like this that the appellee, in the exercise of what he claims to be a right, has committed the wrong before the injunction; he may continue to injure the building, or if not, has placed the house of the appellant in such a condition as to utterly ruin and destroy it, unless as is claimed, the appellant should build up as the appellee tears down. Here the owner of the estate upon which the burden rests undertakes to remove it, and does remove that which is indispensable to the building itself. If left exposed to the weather, or barely supported by the joists left, complete ruin will be the result. What relief should the chancellor

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give in a case like this? It seems to us a judgment should be rendered requiring the appellee to repair the injury by placing the building in the condition it was prior to his wrongful act, and paying such damages the appellant has sustained by being deprived of the use of her building. To do otherwise would be to give appellee a right by reason of his wrong. He ought not to be allowed to say that because he has destroyed the easement, therefore the damages sustained is the only relief the appellant is entitled to.

In the case of *Monroe v. Maynard*, Iowa, 7 Am. Law Reg. 336, the owner of the estate owing the servitude was made to restore it, or the party injured allowed to repair or build at the expense of the party committing the wrong. So in this case, the party should be made to restore the wall and repair the building, or the appellant should be permitted to do so at his expense.

In this case the servitude was not only apparent when the lots were sold but it was plain to all that the building of the appellant could not stand without it, and we see nothing in the proof authorizing the conclusion that the act of the appellee was by the consent of the appellant, and the relief sought should have been granted in the manner designated.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

ON PETITION FOR REHEARING.

PRYOR, J. The facts of this case were fully understood at the former hearing, and while the appellee had the possession of the strip of ground, the joists and rafters of appellant's house were supported by the roof, and the two houses were in this condition when both parties purchased. The appellee has adduced no authority on the question sustaining his view of the case, while the appellant has. The fact of appellee having the possession is not inconsistent with the easement or servitude claimed by appellant. On the return of the cause, the appellee, by appropriate pleading, may build the wall on his own ground, and require the appellant to pay one-half the cost, or make such contribution as the chancellor shall deem equitable. The opinion is modified to that extent.

Petition overruled.

NASH v. PAGE.

(80 Ky. 599.)

Warehouseman — public — right of discrimination.

One who assumes to carry on the business of a public warehouseman for the purchase of tobacco and the public sale thereof at auction, is bound to serve the public without discrimination, and may not select his bidders nor reject any producer.

ACTION for injunction. The opinion states the case. The plaintiff had judgment below.

Brown & Davis and *A. Barnett*, for appellants.

J. F. Bullitt, Isaac Caldwell and *W. Lindsay*, for appellees.

PRYOR, J. This is a controversy between the proprietors of ten of the tobacco warehouses in the city of Louisville and the appellants (twenty-seven in number), who are large dealers in tobacco, and licensed by the United States and the city government, with authority to purchase and sell leaf and manufactured tobacco.

It seems that these appellants were denied the right to make purchases of tobacco at the warehouses of which the defendants are the proprietors, and they applied to the chancellor for an injunction, asking that these warehousemen be enjoined from refusing them permission to make purchases at their several warehouses, and from rejecting their purchases when making the highest and best bids for the tobacco offered, upon the payment of such fees as are charged to other buyers.

The appellants, or the most of them, are large dealers in tobacco, buying, as the record shows, two-thirds or more of the tobacco offered in the Louisville market; and becoming dissatisfied with the warehouse fees charged to them as buyers, they, together with other members of what is known as the Tobacco Board of Trade, demanded of the warehousemen a reduction of the fees from \$2 to \$1.25 per hogshead, with four months' free storage, and forty cents a month storage thereafter. This proposition or demand was rejected by the warehousemen, and on April the 18th, 1879, the appellants met and resolved, on and after the first Tuesday in May, not

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to purchase tobacco from these warehouses, at auction or otherwise, and also withdrew their membership from the board of trade. A new warehouse was opened about, or shortly after, this time by Schwartz and Johnson, and this house charged much less than the old warehouses were charging for either selling or storing tobacco. About the 1st of July, 1879, the board of trade adopted a by-law by which warehousemen, who were members of the board of trade, were prohibited from selling tobacco, publicly or privately, to any but members of the board, or to applicants for membership, and the members were also prohibited from buying at any warehouse in the city, the proprietors of which were not members. For a violation of this by-law they were subject to expulsion from the board.

On the 10th of February, 1872, the proprietors of these warehouses, or the most of them, said to their patrons and the public, in a publication made, that they had closed their respective tobacco warehouses, and withdrawn from working under the law as it then existed, and would, on the Monday following, open as commission merchants for the sale of tobacco, cotton and other products of the soil, the fees for selling tobacco the same as heretofore, and for other products the customary commissions, etc.

After the resolution passed by the appellants that they would not purchase tobacco at the warehouses owned by the defendants, and the resolution adopted by the defendants (appellees), prohibiting them from purchasing, the appellants, ascertaining that the new house, known as the Enterprise, could not furnish enough tobacco to supply their wants, offered to purchase of the appellees, and were denied the right, and hence this action. This, in substance, is the history of the controversy, as given by the chancellor, and verified by the record before us. It is a matter of history, and also a fact appearing from this record, that the tobacco trade in the city of Louisville is very large, the annual sales approximating in value six millions of dollars, and the trade constantly increasing.

Since the formation of the State government, the sale of this great staple has been fostered and protected by legislation. The rights and duties of the warehousemen, the buyers and sellers, and all the officers connected with the warehouses, have been defined by statute, and no commodity has received the same protection in the way of either general or special legislation. Nine-tenths of the tobacco is sold at auction, with the right unquestioned, until the present controversy, of all parties to enter the warehouses as buyers

or as sellers, by their warehousemen as their agents, and competition left unrestricted, save the option on the part of the owner to approve or reject the bid. There is no provision, it is true, in any of the statutes now in force, or that existed prior to the law as we now find it, compelling the producer of tobacco to take it to the warehouses in the city of Louisville, or to expose it for sale at public auction; but such warehouses have been always regulated by law for the benefit of the producer, as well as those who are the proprietors of these warehouses, and the latter have assumed an obligation to the public that exists so long as they continue public warehousemen. They have assumed a *quasi* public character under the protection of the law, and will not be allowed to exercise all the privileges that have heretofore belonged to warehousemen, and evade all the duties and responsibilities of their position by the passage of a resolution disclaiming that they are operating their houses in the capacity of warehousemen, but as commission merchants.

They pursue the same business, without any change as to the manner of selling or of conducting their warehouses, claiming only the exercise of a private right, and an entire exemption from the discharge of a public duty. Can this be done; and is the producer at the mercy of a board of trade claiming, regardless of the law for the protection of this great interest, the right to exclude from the warehouses of the city all persons who offer themselves as buyers because they are not members of that board? and to go further, if they see proper, and refuse to receive or sell at auction the tobacco shipped to their houses by the owner or producer? If they are to be regarded as commission merchants only, they can exercise such a right.

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor their persons have any legal concern." Cooley on Torts, 278.

This is a safe rule, and a court, in discriminating between what are public and what are private rights or duties, should be careful not to restrict the citizen in the exercise of a right that permits him to buy and sell when and to whom he pleases, if not in violation of the law of the land; but if in the exercise of a private right the citizen assumes a public duty, there is no reason why he should be

permitted, at his own will and pleasure, to say that the private right exists, but the obligation to the public is abandoned ; I am in fact a public warehouseman for the sale of tobacco, but in name I am a commission merchant. That the producer may sell his own tobacco, or appoint an agent for that purpose, there can be no doubt, and if a commission merchant, it does not affect his right to sell ; but when he undertakes to sell at public auction, and to conduct the business as a public warehouseman, he assumes an obligation to serve the entire public, and has no right to select his own bidders, or to refuse to receive the tobacco of the producer when shipped to him. This obligation exists not only by reason of the statute, but under the rule of the common law. We perceive no difference between this character of warehouse and that of wine warehouses or grain warehouses ; and the rule applied to the latter required them to discharge the duty of receiving the wine and grain shipped to them by the owner. This is the first time in the history of the State that warehousemen, controlled and regulated in their business by legislation, have asserted their right to select their customers, including both the producer and the buyer ; and the custom heretofore existing, sanctioned by the rule of the common law, would, of itself, deny the right claimed by the appellees in this case. A railroad company, regulated by the provisions of its charter, undertakes to carry freight and passengers. Such a corporation is permitted to acquire property in depot buildings, omnibuses and in all things else necessary for the proper and safe transportation of freight and passengers. It has assumed a public duty for the purpose of advancing private interests, and as was decided *in re Marriott*, 1 C. B. (N. S.) 499, such a corporation had no right to say, through its agent, to the owner of an omnibus : You cannot come to this depot for passengers ; we furnish our own conveyances, or have already omnibuses employed sufficient in number to carry passengers. The court held that the corporation was bound to admit the omnibus company to its depot to solicit passengers, on the ground that the railroad was a public servant. So in this case, while the warehouse is the private property of the owner, it has been devoted to a public use, and is controlled and regulated in the conduct of its business for the protection of this great interest. It is not an insurer like a common carrier, and subject to the same liability, but it assumes all the liabilities pertaining to kindred employments.

The case of *Munn v. State of Illinois*, 4 Otto, 113, bears directly upon the question raised in this case. In that case it was claimed that the exercise of the legislative power of the State of Illinois was in violation of the Constitution of the United States in attempting to regulate by statute the maximum charges for the storage of grain in warehouses at Chicago and other places in the State, in which grain is stored in bulk, and the grain of different owners mingled together. The right of private property, and to deal and trade as these warehousemen might see proper with those who applied to them to store their grain, was insisted upon in that case; but it was there held that "property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When therefore one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control." There is a manifest distinction between the manner in which the business of selling tobacco at these warehouses is conducted and those who are engaged in the ordinary business of commission merchants. These warehousemen now have, and always did have, in this State, public duties to perform, and to attempt to control by legislation the ordinary business of mercantile establishments in the same manner as the duties of these warehousemen are defined and regulated, would be in violation of both the Federal and State Constitutions. If the fourteen warehouses in Chicago can be regulated in their charges because of their relation to the public, the ten warehouses in the city of Louisville can be regulated in the same manner, and because the statute of this State is more liberal in its provisions toward the owners of these public warehouses than that of the State of Illinois is no argument in favor of the right of the appellants to relieve themselves of the duty they owe to the public. It is a conceded fact that more than five millions in value of tobacco annually find its way from the producer to the warehouses in that city. The greater part of this product is grown within the State, and the producer almost of necessity compelled to place his tobacco under the control of and for sale by these several warehousemen at public auction. All this tobacco must necessarily pass through these warehouses, subject to

such charges as are reasonable and proper, and to say that the proprietors, with such relations to the public, can forbid buyers to enter their auction room, and to deny to any but members of the board of trade or applicants for membership the right to make purchases, is a palpable disregard of the duty they owe to the individual patron as well as to the public, and in the absence of any statute, is in violation of the rule of the common law. Such a public duty may be imposed on these warehousemen in express terms or by implication, but whether so imposed or not, it arises from the facts of this case. This doctrine had been discussed and in effect settled, long before the rule established in the case of *Munn v. State of Illinois*, and upon the doctrine of the common law in reference to common carriers, such as steamboats, railroads, express companies, stage lines, warehouses, etc. If a public warehouseman can refuse to sell the tobacco of the producer at auction, or deny the right of any to bid for it when offered but those whom he selects or permits to bid, why may not the owner of a steamboat or stage line, without excuse, decline to take the passenger, or the owner of the wine warehouse to receive the wine of others on storage? The steamboat is the private property of the owner; but he has engaged in a public employment, and so is the warehouseman, although not of the same character; but the undertaking of each is affected with a public interest, and for that reason the steamboat is compelled to take freight and passengers, and the warehousemen to receive and store and sell at auction the tobacco of the owner, and all are allowed to enter and compete as bidders.

LORD HALE says: "If one owns the soil and landing-places on both sides of a stream he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body-politic may from time to time impose, and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who, in this connection, only represents and gives another name to the body-politic, is not pecuniarily for his profit, but for the protection of the people and the general welfare; and further, when private property is affected with a public interest, it ceases to be *juris privati* only." And further, "When the king or a subject have a public wharf to which all persons must come who come to that port to unlade their goods, either because they are the wharves only licensed by the queen, or because there is no other wharf in that

port, in that case there cannot be taken arbitrary and excessive duties, but the duties must be reasonable and moderate, though settled by the king's license or charter."

Lord ELLENBOROUGH said, in *Allnutt v. Ingles*, 12 East, 527, in discussing the rights of the proprietor of a wine warehouse: "If other warehouses were licensed in other hands, it would not cease to be a monopoly of the privileges of bonding there, if the right of the public were still narrowed and restricted to bond their goods in those particular warehouses, though they might be in the hands of one or two others besides the companies."

These warehouses are invested with the monopoly of a public privilege, and made so as a matter of necessity, and this authorizes the exercise of legislative power over them for the public welfare. The exercise of such a power we understand not to be questioned in argument; or if so, we think the right too well settled to admit of controversy. The producer of tobacco is restricted, necessarily, to these warehouses in order to have it sold, and to obtain the best market price by competition in bidding. We do not mean to say that the owner could not ship it to New York or to Liverpool, or sell it on his way to market, but that in this great tobacco center the producer is restricted to these public warehouses, or rather, that these public warehouses have a mutual monopoly of the sales of tobacco at auction, and the fact that there is more than one or a dozen such warehouses cannot affect the question.

The act, entitled "An act to regulate the sale of leaf tobacco in this Commonwealth by warehousemen and commission merchants and tobacco dealers on commission," provides that hereafter commission merchants shall have the tobacco weighed before and after cooperage, and both weights recorded, and the owner to be paid according to the highest weight after deducting the exact tare. It provides penalties for the act, but fails to make any provision as to the fees whatever. This liberal legislation toward the public warehousemen or commission merchants does not alter the rule of law applicable to the question raised here.

If called commission merchants, they are nevertheless public warehousemen, and if the character of their business is that of a public employment such as makes them subject in their charges and mode of conducting it to legislative regulation and control, they are public servants, and cannot be said to be engaged only in ordinary business pursuits.

The doctrine that every one should be allowed to manage his own property and his own business in his own way must have some qualification. Our relations to others must, in many instances at least, determine what our rights are, "and when one sustains such a relation to the public, by reason of his public employment or calling, that the people must of necessity deal with him, then he must so use his property and calling as not to injure others; and therefore when these warehousemen undertake to dispose of nearly the entire tobacco product of the State at public auction, and when the producer and buyer are not only invited, but we may say compelled, to patronize these warehouses that their tobacco may be sold, and the wants of the purchaser supplied, it would be violating every rule of fair dealing to adjudge that the warehouseman shall determine for himself whose tobacco he will sell, and when offered for sale, what man or set of men shall compete as bidders. Such a doctrine is in violation of the duty the warehouseman owes to the public, a disregard of the statutory regulation of the State on the subject, and opposed to the rule of the common law.

We cannot therefore concur with the chancellor below in the conclusion reached upon this branch of the case, and the remaining inquiry will be directed to the position occupied by the appellants in this case, with a view of ascertaining whether the chancellor should interpose by injunction in their behalf. They were members of the board of trade by which the prices for the sale and storage of tobacco were fixed. They complain that the warehousemen were charging them as buyers more than was proper; that \$1.25 per hogshead was a sufficient charge, while they were requiring them to pay \$2 per hogshead. The warehousemen rejecting their proposals, they resolved in a body not to buy any tobacco at auction or private sale, directly or indirectly, from any of the warehouses, until they should accede to their demand for a reduction of the fees, and withdrew from the board of trade. Here there was a disagreement with the members of the same board, and appellants were attempting to compel the other members to reduce the fees for the purpose of advancing their own interests as buyers. They were violating the rules of the board not for the public good, but for individual gain, and notified the appellees of the agreement made among themselves not to purchase longer at their warehouses and when this was done, the proprietors of the warehouses resolved that they would not permit them to sell or buy in their warehouses.

The appellants claim the right to resolve not to deal with these warehousemen, but denied to the warehousemen the right to prohibit them from purchasing at their auction sales. We have already adjudged that all have the right, upon the payment of reasonable fees and charges, to enter these public warehouses for the purpose of having their tobacco sold, or to compete in the bidding, nor do we determine that such a right does not belong to the appellants; but while this right exists, it does not follow that the chancellor will undertake to grant relief by injunction where the one party is as much in fault as the other. If the proprietors of these warehouses had the right to charge the fees, and this is not denied while the appellants might claim that the charges were too high, still, as members of the same board, they had no legal or equitable right to compel a compliance with their demands on the part of the other members by refusing to enter the warehouses or remain longer in the organization unless their demands were acceded to. It is true they now say they will bid at their sales, and have offered to make purchases, and the principal reason assigned is that the Enterprise house is not selling a sufficient quantity of tobacco to supply their wants. We cannot perceive that the public or private interests require the chancellor to assume jurisdiction of this case for the purpose of settling this quarrel between those who were members of this board, although the controversy has resulted in the withdrawal of membership by those who are dissatisfied with the board's action, and the case must be left to be settled by litigants, whose personal interests in the prosperity of the trade will certainly lead them to a fair adjustment of their differences without the aid of the chancellor.

The judgment is therefore affirmed.

Judgment affirmed.

Coke v. Gutkese.

COKE v. GUTKESSE.

(30 Ky. 568.)

Landlord and tenant — concealment of dangerous condition of premises

Where a landlord lets a house knowing that the timbers of the privy floor are rotten and unsafe, but conceals the fact from the tenant, and the tenant is injured by the defect, the landlord is liable therefor.*

ACTION of damages for personal injury by defect in hired house. The opinion states the case. The defendant had judgment below.

John W. McGee, for appellant.

P. A. Gaertner, for appellee.

HARGIS, C. J. This was an action for damages resulting to the appellant by reason of a defective privy floor, through which she fell into the vault below it.

The petition, which was filed by her next friend, who is her father, alleges, in substance, that the father rented of the appellee the premises on which the privy is situated for one year, and at the time he rented the appellee knew the timbers upholding the floor were defective, rotten and dangerous, but suppressed his knowledge of its condition from the father; that neither she nor her father could discover the dangerous condition of the privy floor by reason of the character of its construction, and that she fell through the floor, which broke under her, and was precipitated into the vault below, and greatly damaged, physically and mentally, by the fall, for which she prayed judgment for \$10,000 in damages.

To this petition a demurrer was filed and sustained, from which the appellant appealed.

Although the law presumes that it was her father's duty to repair the premises in the absence of an agreement otherwise, still we are of the opinion that if the appellee rented the premises knowing

*See *Oscar v. Karutz* (60 N. Y. 239), 19 Am. Rep. 164.

that the privy was in the condition alleged, it was his duty to disclose his knowledge, because it was a portion of the premises which he knew, as all men know, would be in daily use by his tenant and family, and unless apprised of the hidden danger, they would inevitably be injured, and the younger and more helpless perhaps lose their lives.

And if as alleged he failed to disclose his knowledge, but nevertheless rented the dangerous tenement to the plaintiff's father, with whom she lived, he is responsible for the injury she received.

This case is not like the cases cited, where the premises were defective or dangerous, but unknown to the lessor, who is not bound to repair, and in such cases not responsible for injuries to third persons. They lack the ingredient of knowledge, and the culpable neglect in disclosing it, about tenements or premises whose dangerous character could not be known by ordinary care, and whose use necessarily placed the occupant in peril.

Wherefore the judgment is reversed, and cause remanded, with directions to overrule the demurrer, and for further proper proceedings.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

DESBIBES V. WILMER.

(69 Ala. 25.)

Guardian — testamentary — essentials of appointment.

A testamentary guardian can only be appointed by an instrument admitted to probate and naming the person intrusted with the care and nurture of the infant.

APPPLICATION to be appointed guardian. The opinion states the case. The application was refused below.

Henry St. Paul, H. C. Semple and D. S. Troy, for appellant.

P. Hamilton and James Bond, contra.

STONE, J. We enter upon the discussion of the questions raised by this record with deep feelings of regret; regret that the case has been brought before us, and deeper regret that any occasion should have arisen for its presentation. It is history, that differences in religious faith and creed have given rise to the most inveterate and sanguinary quarrels the world has witnessed. "Vengeance is mine," is the language of inspiration, but mistaken duty

and misdirected zeal have often prompted the fanatical to usurp this divine authority. Religious quarrels or persecutions find no warrant, or even palliating excuse, in our constitutions and jurisprudence. All religions, save such as shock the public morals, or offend our statutes, are alike tolerated and protected by the broad philanthropy of our republican policy. Our theory is to "render unto Cæsar the things that are Cæsar's and unto God the things that are God's." We disturb no man's faith, unless it is made manifest in acts which violate municipal regulation. We deal with the physical and secular, and not with the mere moral which is not uttered in voice or act, offensive to our legislative policy. We have indulged in these general reflections, for the purpose of making more emphatic the declaration, that what may be considered the religious aspects of the present contention, can receive no consideration at our hands. We must deal with the case upon its dry legal bearings, as if it presented no question of religious differences; in other words, as if the rival claimants were of one religious faith. We are but a tribunal for the enforcement of municipal law, one of whose fundamental maxims is, "that no preference shall be given by law to any religious sect, society, denomination or modes of worship; * * * that no religious test shall be required as a qualification to any office or public trust under this State; and that the civil rights, privileges and capacities of any citizen shall not be in any manner affected by his religious principles." Declaration of Rights, § 4.

Moral and theological problems are often of most difficult solution. The broadest philosophy is unconsciously warped by one's own creed. We say one's own; because by adopting it, we furnish the highest evidence that our conscience approves it. Yet another, having equal advantages and equal intelligence, will condemn it as sincerely as we advocate it. Who is right, and who shall judge between us? This precise liberty of conscience — this right to differ with our fellow-men — our Constitution not only tolerates, but guarantees to every man. Hence it is that questions of polemic theology can never obtain a standing in our courts of judicature. Hence it is that the religious aspects of this case must be entirely ignored by us.

What we have said above has been prompted in part by the fervid language of the counsel of appellant. What are claimed as "the still more precious rights of conscience," the baptism "in the

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church to which he [Chas. Corege] on his death-bed acknowledged spiritual allegiance," the assertion that "the main issue raised is as to the religious training of the children;" these and many other similar expressions, we must confess, we find no warrant for in the record; and we again say, in the form here presented, they can exert no influence in our deliberations. It is our purpose to censure no one, while at the same time we feel it our duty to dis sever the contention from all supposed sectarian bearings. Viewed from a legal stand-point, they cannot be factors in our deliberations.

There is a social aspect of this question, upon which we feel authorized to express an opinion. We do not doubt the Church Home is a well founded and well governed asylum for the orphan and the destitute. We do not doubt that the children, over whom the present controversy arose, are as well and tenderly cared for, as they could be in any institution of eleemosynary foundation. We do not doubt their moral, religious, industrial and social training will be excellent. We do not doubt all will be well with them, during their stay in the home. How will it be when the time comes for them to leave the asylum, and enter upon the battle of life? Just entering upon womanhood, penniless, in a land where they can claim no blood relationship, who shall bear up such frail things amid rude and unsympathizing surroundings? Contrast with this picture the home and environments of an honorable and respected ancestry, the feeling of loyal attachment for an ancient family which descends from sire to son, and above all the sympathy and sustaining force which blood relationship always feels and exerts, and who could hesitate in choosing, when religious predilection is kept out of view? For myself, I think it would have been better for the children, all things considered, if they had been restored to their "kinsmen according to the flesh." But the social bearings of the question are not for us. In the primary court, other things being substantially equal, we will not say that moral and social bearings and surroundings should be overlooked, in making the selection.

In the selection of a guardian, the interest, safety and well-being of the infant ward, are matters of prime, paramount consideration. *Lee v. Lee*, 67 Ala. 406. Infants — particularly doubly orphaned, destitute infants — are, or should be wards of society, if not of government. Their protection and proper training are alike the instinct and mandate of an enlightened humanity. No sordid greed

of lucre, no unchastened spirit of propagandism, should shade or pollute its benevolent purposes. The best attainable good of the infant should be the great, dominating principle; not the provisional benefit, but the lasting good.

How does the present case stand on questions of dry law? It is contended for appellant, that he is entitled to the guardianship of the children, because Charles Corege, the father, appointed him to be such. Testamentary guardianship was created in England by statute, 12 Charles II, and consequently was unknown to the common law. 1 Black. Com. 462; Schoul. Dom. Rel. 393. Section 2751 of the Code of 1876, provides that, "guardians may be appointed by the last will and testament of the father, if the right is claimed within six months after the will is admitted to probate." The paper relied on as conferring the right to guardianship in the present case, is in the following language: "State of Alabama, Mobile city. With grateful acknowledgment of the kindness to my two minor children, named Louise Adele Corege, 10 years old, and Emma Heloise Corege, 9 years old, by the managers of the Protestant Orphan Asylum, but being myself lying in danger of death at the city hospital in the city, and having found kind friends to take charge and raise my said children, I respectfully request the managers of the Protestant Orphan Asylum of this city to place my said children in the custody of Rev. Father Joseph Desribes of this place. In witness whereof, I have hereunto set my hand at Mobile, Oct. 5, 1880. [Signed] Chas. Corege."

This instrument had two subscribing witnesses, and on the same day, a notary public of Mobile certified to its acknowledgment, before him, adopting the form prescribed for the acknowledgment of deeds—§ 2158 of the Code of 1876. It was not probated as a will. There are two unanswerable objections to the position here assumed. An instrument testamentary in its character cannot be recognized as valid in any form until it has been admitted to probate. 2 Brick. Dig. 532, § 105. But if probated, this instrument cannot be construed as appointing Rev. Joseph Desribes to be guardian. It not only fails to indicate that he was to have the care, protection and nurture of the children, but by clear implication, shows the contrary. Unnamed kind friends were to take care of and raise the children. The instrument, to be effectual as a testamentary appointment, must show who is to have their care and nurture, but the word guardian need not be employed. *Gaines v.*

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Spann, 2 Brock. 81 ; *Wardwell* v. *Wardwell*, 9 Allen, 518 ; *Corrigan* v. *Kiernan*, 1 Bradf. Sur. 208 ; *Miller* v. *Harris*, 14 Sim. 540.
[Omitting minor matters.]

Judgment affirmed.

CENTRAL RAILROAD AND BANKING COMPANY V. LETCHER.

(99 Ala. 106.)

Negligence — contributory — leaving train in motion.

One who entered a railway train as an escort for a woman, to find her a seat and who was injured in the endeavor to leave the train while it was under way, with some papers in his hand, is without remedy. (*See note*, p. 506.)

ACTION for personal injury by negligence. The opinion and head-note show the case. The plaintiff had judgment below.

Geo. P. Harrison, for appellants.

J. M. Chilton, *W. H. Barnes* and *W. J. Samford*, contra.

BRICKELL, C. J. In *M. & C. R. v. Copeland*, 61 Ala. 376, the undisputed facts were, that plaintiff's intestate attempted to cross defendant's railroad track, by passing under the coupling of two box cars, which were coupled together and constituted part of a freight train, then standing temporarily on the side track, placed there with locomotive and steam up, to allow a passenger train to pass it. While in the act of passing under the coupling, the train was moved, and he was knocked down, run over and killed. There was conflict in the proof as to whether the required signals were, or were not given ; but upon the assumption that the signals required by statute were not given, and upon a consideration alone of the undisputed facts, we held, that the attempt thus to pass between the cars of a train, which he must have known was liable to be moved, could not be classed as less than negligence, bordering on recklessness. "It certainly contributed," we said, "proximately contributed to the very sad disaster which followed. If the usual signals had been sounded, probably the intestate could have extricated himself in time to save his life. If he had not attempted to

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cross over between the cars, he would have been in no peril, and suffered no injury. Both were in fault." Our decision in that case was, that there could be no recovery against the railroad company, although there was on its part negligence in failing to give the signals required by statute, immediately before and at the time of the moving or departure of the train, the injury not having been inflicted wantonly or intentionally.

Applying the same principles to the facts of this case, as shown by the evidence of the plaintiff, and deducing therefrom every inference advantageous to him, which may be fairly and properly deduced; excluding all evidence favorable to the defendants, the injury of which he complains is attributable directly and immediately, not to the negligence imputed to the defendants, but to his own thoughtless and reckless act. The risk he assumed, and assumed only to avoid a slight temporary inconvenience, in view of the circumstances, was more hazardous than that Copeland assumed. When he endeavored to pass under the train, it was motionless, and there was no indication that it would be moved before he would have passed beyond it. The train here was moving from a regular depot, on its accustomed journey, the speed increasing every moment; all who were in charge of it were ignorant that the plaintiff was upon it; and without notice, or request to any of them to slow or stop the train, without an effort to arrest its progress, of his own accord, his right hand filled with papers taken from his pocket, he walks from one platform to another, and descends in a manner that was almost certain to cause him to fall. To permit him to recover of the defendants for the injuries sustained by the fall, would be simply compelling them to compensate him for his own wrongful and reckless act. Under these circumstances, the court should have instructed the jury, on the request of the defendants, that the plaintiff had no right of recovery. There was really no question to submit to the determination of the jury, without seeming to invite them, under the influence of sympathy for the sufferings of the plaintiff, or upon conjecture and speculation, to render a verdict it would have been the duty of the court to set aside. *M. & C. R. Co., supra; R. Co. v. Houston*, 95 U. S. 697.

As was said by BLACK, C. J., in *R. Co. v. Aspell*, 23 Penn. St. 147: "It has been a rule of law from time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties.

When it can be shown that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained." The negligence of the employees of the defendants—the failure to sound the whistle or to ring the bell, as required by the statute, immediately before and at the time of leaving the depot, involved the defendants in liability for all injuries to person or property, resulting from the failure. Of itself, and in itself, it was negligence. *M. & C. R. Co. v. Copeland, supra*; 2 Thomp. Neg. 232, § 8. The statute does not relieve whoever may be in peril of injury from the neglect of the servants and employees of the railroad company to observe its requirements, from the duty and necessity of taking ordinary care to avoid the injury; nor does it modify or abrogate the principle, that a plaintiff shall not recover for unintentional injuries—for injuries not wanton—to which his own negligence directly and immediately contributes. *R. Co. v. Houston, supra*.

The only injury which could have resulted to the plaintiff, from the neglect to give the signals for the departure of the train, was the inconvenience of being carried from his home, the loss of time and the labor or expense of returning. These were the immediate, direct consequences of the neglect. To avoid them he was not justified in putting in jeopardy life or limb; and if he should, and other injury result, the compensation he can rightfully demand is not increased. What would have been his rights, if there had been the presence or pressure of impending peril of personal injury, and to avoid it, he had leaped from the train; or what would have been his rights, if under the advice, direction or command of an agent or employee of the defendants, he had left the train as he did, are not questions now for consideration. In the absence of such peril, or of such advice, direction or command, or of some other circumstance, lessening the carelessness of the act, or giving to it the color of necessity, leaping from a moving train by all the authorities is esteemed negligence, debarring a recovery because of the prior negligence of the servants or agents of a railroad company. The question is fully considered and discussed in authorities to which we refer. *Lucas v. N. B. & T. R. Co.*, 6 Gray, 64; *Morrison v. E. R. Co.*, 56 N. Y. 302; *Burrows v. E. R. Co.*, 63 id. 556; *R. Co. v. Aspell*, 23 Penn. St. 147; *Damont v. N. O. & C. R. Co.*, 9 La. Ann. 441; *J. R. Co. v. Hendricks*, 26 Ind. 228; *Dougherty v. C. B. & Q. R. Co.*, 86 Ill. 467; *Lambeth v. N. C. R. Co.*, 66 N. C. 494;

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Doss v. M. K. & T. R. Co., 59 Mo. 27; *Nelson v. A. & P. R. Co.*, 68 id. 593; *L. S. & M. S. R. Co. v. Bangs*, 47 Mich. 470.

The Circuit Court erred in several of its rulings, and especially in refusing, on request, to charge the jury on the evidence to find a verdict for the defendants.

Reversed and remanded.

NOTE BY THE REPORTER.—In *Houston & T. C. Ry. Co. v. Leslie*, 57 Tex. 53, it was held that a passenger on a railway car who leaps from it when the train is in such rapid motion as to render the act manifestly unsafe, cannot recover damages for the personal injuries suffered by his thus leaping from the car, nor are his rights affected by the act of the employees managing the train, in not stopping at the depot where the passenger stopped in the car the five minutes required by statute, whereby he was being carried away without his consent. The court said:

"The dereliction of the company to stop the five minutes required by law was not per se an act rendering the defendant liable, irrespective of the question of contributory negligence on the part of the plaintiff. *Gal. H. & S. R. Co. v. Le Gierse*, 51 Tex. 129. In that case it was held that 'while the company may have been guilty of negligence in not waiting five minutes at the station, such negligence would not justify the injured party in attempting to get on board the cars while in motion, if such act, under the circumstances, was negligence and contributory to the injury.' The act of the plaintiff which resulted in the injury being a dangerous one, so much so as to have wholly produced the fracture of plaintiff's arm, and one not immediately induced through the persuasion, direction, command or other influence attempted to be used by the defendant's agents, there are not apparent any circumstances to have operated upon the plaintiff's mind when he met with this accident, except his ill-judged determination to risk the consequences of the fatal leap. Therefore, applying the principles of law laid down in *Railroad Company v. Le Gierse*, *supra*, the plaintiff's case, according to the evidence, did not entitle him to recover.

"The rule," it is said in 6 *Wait's Actions and Defenses*, 553, 'may be said to be, that a person cannot recover for any injury received by reason of the negligence of another, if his own want of care directly contributed to the injury; for where one rushes upon danger, which might have been avoided by the exercise of ordinary care on his part, he cannot complain if others have failed to exercise a greater degree of care than he did. But in order to shield the other from liability, the person injured must have not only been negligent, but his negligence must have been the proximate cause of the injury. He must, by his own want of care, have directly contributed to the injury. That is, by his own want of ordinary care, he must have done that which has directly brought it about, and thus have placed himself or his property in a position where, except for his co-operative fault, no injury would have been sustained; and his act must have also been such as a man of ordinary prudence would not have done in view of the circumstances. Otherwise he cannot be charged with that degree of negligence which operates to excuse the other from the consequences of his fault.' Citing numerous authorities.

"And again, *id.* 584: 'To operate as a defense, the plaintiff's negligence must have proximately contributed to the injury. If the negligence of the defendant was the proximate, and that of the plaintiff the remote cause of the injury, an action will lie although the plaintiff was not entirely free from fault. The fact that the plaintiff is guilty of negligence does not relieve the defendant from using all reasonable care to prevent an injury to him or his property; and if he inflicts a willful injury, or neglects to use reasonable care to prevent it, he cannot set up the plaintiff's negligence as a bar to the recovery therefor.' Citing 75 Ill. 106; 51 Miss. 234; 28 Ohio St., 340; 81 Ill. 500; 11 Hun, 323.

"A passenger upon a steam car, who voluntarily and without cause exposes himself to danger, cannot recover for injuries sustained by such exposure; as if a passenger attempts to get on or off a car when it is in motion. *Burrone v. Erie R. Co.*, 63 N. Y. 54, where it is said that this seems to be the rule even though the train has stopped, but started again before the passenger could alight. *Id.* And the fact that the passenger's

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being carried by the station at which he wishes to alight will not excuse his act. *Mette-
stadt v. Ninth Av. R. Co.*, 4 Robt. 377; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 238. If
the car is in rapid motion, or the circumstances are such to indicate that it is dangerous
to alight, neither the advice nor directions of the conductor will justify the act. *Guinon
v. N. Y. & H. R. R. Co.*, 3 Robt. 25; *Penn. Co. v. Aspell*, 28 Penn. St. 147.

"Other similar instances of non-liability for injuries sustained through the incautious
or imprudent acts of passengers on railroad cars can be readily multiplied. The act of
the plaintiff in this case, whereby he sustained the injury complained of, is of the char-
acter of the class above instanced; and the plaintiff, when he found himself safely on the
defendant's cars, although being rapidly carried away unwillingly from home, was re-
quired under the circumstances to act with prudence the same as would be required of
any other passenger; and whilst the defendant was not without fault, that fault of too
speedily leaving the station did not endanger the personal safety of the plaintiff, and in
its very nature could not be the proximate cause of the injury which the plaintiff received
through his own direct act, and which was the proximate cause of said injury. See *Rail-
road Company v. Le Gierse*, *supra*."

See *Jewell v. Chicago, etc., R. Co.* (54 Wis. 610), 41 Am. Rep. 63 and note, 65.

SNOW V. SCHOMACKER MANUFACTURING COMPANY.

(69 Ala. 111.)

Sale — warranty, implied and express.

Where a piano manufacturer sells a piano of his manufacture to one whom
he knows to be a piano dealer and purchasing to resell or let, there is an
implied warranty that the material and workmanship are good, that the in-
strument shall be reasonably adapted to the uses for which it is made and
sold, and that it shall be a reasonably good instrument considering the class
or style and price.*

Where a piano manufacturer offers by letter to sell pianos of his manufacture,
stating terms, and directing attention to an accompanying circular on the
front page of which is conspicuously printed, "Every piano warranted for
five years," these words constitute a warranty that each piano sold has no
inherent defect of materials or workmanship that will cause it to break or
give way in five years, but not a warranty of style or grade.

ACTION for price of pianos. The opinion states the case. The
plaintiff had judgment below.

Overall & Bestor, for appellant.

Gaylord B. & Frank B. Clark, contra.

STONE, J. In February, 1875, the plaintiff below, appellee
here, instituted and commenced the correspondence, which led to

*See *Gord v. Jones* (23 Gratt. 518), 34 Am. Rep. 773; *Harris v. Wattle* (51 Vt. 481), 31 Am.
Rep. 604.

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the sales of pianos by the Schomacker Manufacturing Company to Snow. Those sales and their stipulations furnish the entire subject of this controversy. All the testimony shows that the sale and delivery of the pianos, about which there is contention, were made and perfected in the State of Pennsylvania. It follows, that as to the obligations of the contract, express and implied, the construction must be determined by the law of the place where the contract was made. Whart. Conf. of Laws, § 401, g ; Story Conf. of Laws, § 76 ; 1 Brick. Dig. 352, §§ 20, 22, 24, 27.

What are the laws of Pennsylvania, governing the questions presented in this record, was not proved in the court below. We are not permitted to look beyond the record, for information on this subject. *Drake v. Glover*, 30 Ala. 382. But Pennsylvania being one of the States having a common origin with our own, in the absence of proof to the contrary, we presume the common law prevails there. 1 Brick. Dig. 349, § 9.

The present suit was brought to recover the agreed price of two pianos, sold and delivered in Pennsylvania in 1877. The plaintiff proved the sale and delivery, and the agreed price, and then closed. The articles sold were manufactured by the plaintiff, and were sold to the defendant, with a knowledge on the part of the plaintiff, that defendant was a dealer in pianos, and was purchasing to resell, or let to rent. As their name imports, they were manufactured and sold as musical instruments. When a manufacturer contracts to sell an article of his own make or manufacture, and there is no express agreement as to warranty, the law implies a warranty on the part of the seller that it shall be reasonably fit for the purpose to which it is to be applied. Benj. on Sales (3d Am. ed.). § 657 ; 2 Ross Lead. Cases, m. p. 358 ; *Jones v. Bright*, 3 M. & P. 155 ; *Pacific Guano Co. v. Mullen*, 66 Ala. 582. This implies that the material and workmanship shall be good, and that the instrument shall be reasonably adapted to the uses for which it is made and sold ; that it shall be a reasonably good musical instrument, taking into the estimate the class or style, and the price for which it is sold. If by reason of defective material, workmanship or structure, it falls below this standard, there is a breach of this implied warranty.

The defendant pleaded recoupment and set-off, and claims that in addition to the implied warranty referred to above, there was an express warranty of the pianos he purchased, to continue and be in

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force for five years. The testimony tends to show the following state of facts : Under date February 16, 1875, the president of plaintiff wrote to defendant and another, his former partner, stating that "at present our instruments are not represented in your section," and inviting him to become a purchaser of plaintiff's pianos. The letter offered generous terms, spoke highly of the merits of the instruments, and in a postscript said : "We have mailed you our catalogue and price list, which we would like you to examine, and would particularly call your attention to style No. 6, which is a very leading instrument, and which we purpose to reduce to you on our schedule to \$600, which will give you a 7 1-3 oct. piano for \$270 on the thirty days' basis. We intend making a specialty of this style, and will run it extensively." The defendant answered this letter in his own name, under date March 13, 1875, and among other things, informed plaintiff that he and his former partner had dissolved, by the withdrawal of the latter. He made an offer in said letter, different from that made by plaintiff. Plaintiff replied March 18, declining defendant's offer, and urging defendant to accept his, plaintiff's. This was done ; and on April 3, 1875, plaintiff wrote defendant as follows : "Inclosed I hand you bill and bill lading of four pianos sent to you as per your order," etc. The bill of lading describes the pianos by their several numbers of octaves, by their style numbers, manufacturer's numbers, and by their several prices. In the bill of exceptions is an original advertisement or circular, containing many certificates of recommendation, and a price list, setting forth nineteen different styles of piano, with brief description, and price of each style, all in type, and prefaced with a cut or engraving of the manufacturer's building. The style, numbers and prices on this price list correspond with the style, numbers and prices on the bill sent to defendant. The defendant testified that this advertisement or circular and price list reached him by the same mail which brought him plaintiff's first letter, referred to above. The president of the company testified "that the catalogue and circular, introduced by Snow in evidence, were not mailed to Snow and Snow & Brown at the same time he wrote the first letter, and that defendant could not have received them until a long time afterward, some eighteen months perhaps." So there was conflict in the testimony as to whether Snow received this circular and price list, until after he had purchased several pianos, including those first ordered as above. On the first page of this cir-

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cular, below the cut or engraving, are the following words in printed capitals: "Every piano warranted for five years."

In the court below much testimony was offered, and some received, tending to show the usage and general custom with piano manufacturers, in regard to warranties in the sale of their merchandise. Much of this testimony, we think, related only to the habit of other manufacturers in their own dealings, rather than to a general usage or custom of trade. Most or all of this testimony, as we shall hereafter show, was either illegal, or redundant or immaterial. Strictly there was no legitimate testimony offered, which tended to show, that in the absence of all express stipulations to that effect, there was a general custom or usage with piano manufacturers that they warranted all pianos sold by them of their own make. Their testimony is, that in their dealings they give express written warranties, stating the number of the piano, the date of the sale, and the term of the warranty. Most of the testimony sought to be introduced to establish a general custom was nothing more than what the witness thought the manufacturer should have done under the circumstances. Some of the witnesses undertook to testify to the meaning and import of the words relied on as constituting the warranty in this case. The president of the plaintiff corporation, in his testimony before the jury, stated "that the word 'warranted' in the circulars and in the catalogues, merely meant warranted to be a piano." According to this, the language should be read, "Every piano warranted [to be a piano] for five years." This, to say the least of it, is a strange use of language. But we need not pursue this inquiry further.

What is the proper construction of the words, "Every piano warranted for five years?" We think no outside testimony is needed to show their import. Language must be interpreted with reference to the subject about which it is employed. Here the subject was a well-known musical instrument, now universally called a piano-forte—having reference to the softness and fullness of its tones. The excellence of such an instrument must depend on many things, and among them, chiefly, the goodness of the materials, and the skill and fidelity of the workmanship. If the instrument be so constructed and adjusted as to respond readily to the touch, to give forth pleasing and properly graduated sounds through the range of its keys, and the frame-work be so adapted and put together as to retain the strings in tension, and the mechanism

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does not yield or break in any part of it, these are certainly points of excellence. But these qualities depend much on the grade and costliness of the instrument. We cannot think the word "warranted," without more, is definite enough to cover and guaranty the style or grade of the instrument. That must be determined by the purchaser. We think the true meaning is, that with reasonable and proper treatment and handling it will not break or give way in five years. In other words, that it has no inherent defect, either of materials or workmanship, which will cause it to break or give way within five years after the sale. And by mechanical skill, we mean not merely that the parts shall be well fitted, and securely put and fastened together, they must be properly adapted, adjusted and harmonized, to secure the proper effect. But the present warranty reaches only breaks, or giving way, occurring within the five years.

[Omitting other matters.]

Reversed and remanded.

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(60 Ala. 231.)

Constitutional law — discrimination in punishment of adultery by mixed races.

A statute prescribing for the offense of living in adultery or fornication, when committed by a negro and white person together, a different punishment from that prescribed when the offense is committed by two white persons or two negroes, is not unconstitutional. (*See note, p. 515.*)

CONVICTION of adultery or fornication. The opinion states the case.

John R. Tompkins, for appellant.

H. C. Tompkins, attorney-general, for State.

SOMERVILLE, J. The indictment here charges, that "Tony Pace, a negro or the descendant of a negro to the third generation inclusive, a man, and Mary Ann Cox, a white woman, did live together in a state of adultery or fornication." The offense charged

is that denounced by section 4189 of the Code. The language of this section is, "live in adultery or fornication with each other."

[Minor question omitted.]

The statute, under which this indictment is found, is not, in our opinion, obnoxious to any constitutional objection, it is not, as insisted by appellants' counsel, violative of the first section of the Fourteenth Amendment of the Federal Constitution, which forbids a State to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" or to "deny to any person within its jurisdiction the equal protection of the laws." The fact that a different punishment is affixed to the offense of adultery when committed between a negro and a white person, and when committed between two white persons or two negroes, does not constitute a discrimination against or in favor of either race. The discrimination is not directed against the person of any particular color or race, but against the offense, the nature of which is determined by the opposite color of the cohabiting parties. The punishment of each offending party, white and black, is precisely the same. There is obviously no difference or discrimination in the punishment. The evil tendency of the crime of living in adultery or fornication is greater when it is committed between persons of the two races, than between persons of the same race. Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government. To thus punish the crime denounced by the statute, by imposing the same term of imprisonment and the identical amount of fine upon each and every person guilty of it, can in no sense result in any inequality in the operation or protection of the law. This view of the case is fully settled by the past decisions of this court, upon which it is entirely needless to enlarge. *Green v. State*, 58 Ala. 190; s. c., 29 Am. Rep. 739; *Ford v. State*, 53 Ala. 150; *Ellis v. State*, 42 id. 525; *Hoover v. State*, 59 id. 57. It is also sustained by the decisions of the highest courts of many of our sister States. *State v. Gibson*, 36 Ind. 389; s. c., 10 Am. Rep. 42; *State v. Kennedy*, 76 N. C. 251; s. c., 22 Am. Rep. 683; *Fraser v. State*, 3 Tex. Ct. App. 263; s. c., 30 Am. Rep. 131; *Kinney v. Com.*, 30 Gratt. 859; s. c., 32 Am. Rep. 690.

[Minor points omitted.]

Woodbury v. State.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—This decision was affirmed by the United State Supreme Court, January 29, 1883. FIELD, J., said : "The counsel is undoubtedly correct in his view of the purpose of the clause of the amendment in question, that it was to prevent hostile and discriminating State legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected for the same offense to any greater or different punishment. Such was the view of Congress in the re-enactment of the Civil Rights Act, after the adoption of the amendment. That act, after providing that all persons within the jurisdiction of the United States shall have the same right in every State and Territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, declares that they shall be subject 'to like punishment, pains, penalties, taxes, licenses and exactions of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.' 16 Stats., ch. 114, § 16.

"The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offense for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person. The two sections of the Code cited are entirely consistent. The one prescribes generally a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."

WOODBURY V. STATE.

(69 Ala. 242.)

Criminal law—false pretenses—statement of residence—laches.

A false and fraudulent statement by the defendant of his place of residence does not amount to a false pretense unless it is shown that the other party relied thereon and that it formed a controlling inducement; but it is no defense that inquiry would have defeated the attempt to deceive.*

* See *Bowen v. State* (9 Baxt. 45), 40 Am. Rep. 71, and note, 75.

CONVICTION of false pretenses. The opinion states the case.

Gregory L. Smith, for appellant.

H. C. Tompkins, attorney-general, and *F. B. Clark, Jr.*, for State.

BRICKELL, C. J. The indictment contains three counts, — the first charging the appellant with the larceny of a sewing machine, of the value of \$60, — the second and third charging him with obtaining the machine under false pretenses. The appellant pleaded not guilty, and the verdict was of guilty on the second count, which operates an acquittal on the other counts. The questions now presented arise on exceptions to instructions given the jury by the court at the request of the State, and an instruction on the effect of the evidence requested by the appellant, and refused.

The instructions given by the court, numbered in the bill of exceptions two, three and four, are assailed upon the ground that while assuming to state the elements of the offense of obtaining money or goods under false pretenses, they utterly omit or ignore the important inquiry whether the particular pretense alleged had a capacity, if false, to mislead and to deceive, or having that capacity, the prosecutor acted upon it, and was misled or deceived by it, and whether by the exercise of common prudence, he could not have avoided imposition from it. These instructions were probably intended to be literal extracts from opinions of this court, defining this offense, embodying its elements, so far as the facts of the particular cases, and the questions involved, require a definition of the offense, and a description of its constituent ingredients. As applied to the particular cases, the court is committed to their correctness as legal propositions. But it is very far from being a satisfaction of the duty of a primary court, in instructing the jury, to borrow these propositions, and recite these definitions, without adaptation of them to the facts of the case which is submitted for the consideration and determination of the jury. The mere recitation of definitions, or of elementary principles, is more often calculated to confuse and mislead, than to instruct a jury. The instructions given by the court affirmatively, *ex mero motu*, should present the particular case in all the phases and aspects in which the jury ought to consider it; not giving any undue prominence to, or leav-

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ing in obscurity, any phase or aspect there is evidence tending to support, and if such instructions in effect discard or ignore, and thereby induce the jury to discard or ignore any real, material element of the offense imputed to the accused, they ought not to be supported. *Corbett v. State*, 31 Ala. 329; *Gooden v. State*, 55 id. 178; *Holmes v. State*, 23 id. 17.

A false pretense, to be indictable, must be calculated to deceive and defraud. As of an actionable misrepresentation, it must be of a material fact, on which the party to whom it is made has the right to rely; not the mere expression of an opinion, and not of facts open to his present observation, and in reference to which, if he observed, he could obtain correct knowledge. Whether the prosecutor could have avoided imposition from the false pretense, if he had exercised ordinary prudence and discretion to detect its falsity, is not a material inquiry. As a general rule if the pretense is not of itself absurd or irrational, or if he had not at the very time it was made and acted on the means at hand of detecting its falsehood, if he was really imposed on, his want of prudence is not a defense. 2 Whart. Cr. Law, §2128. If the residence of the accused at a particular locality was a material fact in the transaction between him and the prosecutor; if with the intent to defraud the prosecutor, the prisoner misrepresented the locality of his residence, and by means of the misrepresentation obtained the sewing machine, the misrepresentation being a controlling inducement with the prosecutor to part with his property, it is not a defense, that if the prosecutor had taken the precaution to inquire at the particular locality, he could have found it was not the residence of the prisoner, and would not have been deceived and defrauded. The prosecutor had a right to rely on the representation, and there was no obligation or duty to the prisoner to inquire into its truth, or whether he was dealing fairly and honestly.

The false pretense must not only be however of a material fact but it must have been, not the sole, exclusive or decisive cause, but a controlling inducement with the prosecutor for the transfer of his money or property. Other considerations may mingle with the false pretense, having an influence upon the mind and conduct of the prosecutor; yet if in the absence of the false pretense, he would not have parted with his property, the offense is complete. *People v. Haynes*, 11 Wend. 557; 28 Am. Dec. 530. But if without the false pretense he would have parted with his property — if

that is not an operative, moving cause of the transfer — if he did not rely and act upon it, there may be falsehood, but there is not crime. 2 Whart. Ev., §§ 2120-22.

In view of the evidence of the prosecutor, tending strongly to the conclusion, if it is not a positive affirmation, that the misrepresentation of the locality of his residence imputed to the accused had no influence with him in causing or inducing him to part with the sewing machine, the instructions given the jury seem to us erroneous. If to this phase of the case they can be regarded as directing the attention and consideration of the jury, it is only by the construction which counsel, accustomed to a close examination of legal propositions, would place upon them.

As a general rule, if affirmative charges assert correct legal propositions, their generality, obscurity, or ambiguity must be obviated by a request for more specific instructions. But if the immediate, direct tendency of such instructions is to mislead the jury, diverting their attention from material evidence, and from the consideration of controlling inquiries, or creating the impression that they are authorized to exclude evidence they ought to consider, such instructions are erroneous, and must operate a reversal of a judgment they have induced.

These instructions, omitting all proper reference to the evidence of the prosecutor, tending to show that he was not influenced in parting with the machine by the representation of the accused, that his residence was at a particular locality, in effect excluding that evidence from the consideration of the jury, had an immediate tendency to mislead them. It was the duty of the court to instruct the jury, that if the misrepresentation was not an inducing, controlling motive with the prosecutor to part with the machine, there should not be a conviction of the accused upon either of the counts for false pretenses. *Commonwealth v. Davidson*, 1 Cush. 33. It is not necessary to pass upon the other exceptions, as this view will probably be decisive of the case on another trial.

Reversed and remanded.

POLLOCK V. GANTT.

(80 Ala. 373)

Damages — conjectural — agency.

In an action on an attachment bond, a witness may testify to the extent of a merchant's business, and the rate or average of his net profits, if within his knowledge, but may not give his opinion as to the loss he will suffer by the breaking up of his business; nor is it competent to show that by reason of the stopping of his business he lost advances that he had made, and possible profits on shipments of merchandise.*

Where an attachment is sued out by an agent without authority, but the principal does not repudiate the suit, the principal is liable for actual damage.

ACTION on an attachment bond. The opinion states the case. The plaintiff had judgment below.

Farnham & Rabb, for appellants.

Stallworth & Burnett, contra.

STONE, J. The present is a suit by a merchant, and complains that Pollock & Co. wrongfully and vexatiously sued out an attachment against him, and procured it to be levied on his stock of merchandise. The suit is on the bond given to procure the attachment. The special ground of the attachment was, "that the said M. A. Gantt has moneys, property or effects liable to satisfy his debts, which he fraudulently withholds." Two other attachments had been previously, but on the same day, sued out against Gantt by other creditors, and had been levied on the same stock of merchandise. The ground on which those other attachments were issued was the same as that on which the present one was sued out; and the recoveries in those prior suits greatly exceeded the sum the merchandise yielded, after setting apart to the defendant \$1,000 in value of the goods, claimed and allowed to him as exempt. The attachment in favor of Pollock & Co. was sued out by an agent, and the record is silent as to the authority under which the agent acted. The complaint sets forth a copy of the bond, avers that the alleged ground on which the attachment was issued is untrue, and

* See *Metna Life Ins. Co. v. Neeson* (84 Ind. 347). 43 Am. Rep. 91.

avers separately, first, that it was wrongfully sued out, and second, that it was wrongfully and vexatiously sued out. It contains also an averment of special damage, "that at the time of suing out and levy of said attachment on the goods, wares, chattels and merchandise of the plaintiff, by the defendants, J. Pollock & Co., he, the plaintiff, was engaged in the mercantile business, and had a good reputation, credit, business and good customers; and that by and in consequence of the levy of said attachment on his property and effects, his business, reputation and credit have been destroyed and lost, and his customers have withdrawn — to the loss and special damage of the plaintiff," etc. It will be observed that the special damage herein averred relates to his reputation and credit as a merchant, and the value and profitableness of his business as a merchant.

Among the general rules for the recovery of damages are the following: That they must be the natural and proximate consequence of the wrong done; not the remote, or accidental result. And special damages can be recovered only when they are not too remote, and are specially counted on and claimed in the complaint. What are termed speculative damages — that is, possible or even probable profits, that it is claimed could have been realized but for the tortious act or breach of contract charged against defendant — are too remote and cannot be recovered. *Culver v. Hill*, 68 Ala. 66; *Donnell v. Jones*, 13 id. 490; *O'Grady v. Julian*, 34 id. 88; *Boling v. Tate*, 65 id. 417; *Sims v. Glazener*, 14 id. 695; *Burton v. Holley*, 29 id. 318; *Higgins v. Mansfield*, 62 id. 267.

The ground on which special damages are claimed in this case may be summarized as follows: "That plaintiff was a merchant of good reputation and credit, had good customers and was doing a good business, and that by the issue and levy of the attachment, his credit was destroyed, and his business broken up. The issue formed on these averments opened the door for proof and disproof of every material fact embraced within the issue thus formed. It opened the door no wider. It did not let in evidence of any special damage, of which the averments in the complaint give no notice. This, for the obvious reason, that any other rule would operate a surprise and injustice to the defendants. Hence the rule requiring special averments, to authorize a recovery of special damages. And if the damages claimed be of the class called speculative, or otherwise too remote, even special averments will not authorize their recovery.

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The general rule is that only facts can be given in evidence. Facts are sometimes simple, sometimes collective. Still, the witnesses speak only of facts. It is for the jury to draw inferences and conclusions. There are exceptions to this rule. Experts can testify to opinions; and there are many questions upon which a non-expert witness may express his judgment or opinion. Value, length of time, distance, and many others, fall under this class. So, good or bad character, good or bad credit, is a conclusion of fact, partly based on opinion and judgment, founded more or less on reputation; and the proper predicate being laid, any one may testify to it as a fact; a collective fact, made up of many known ingredients. The proper predicate to be laid is, that the witness has sufficient knowledge of the subject — character or credit — about which he proposes to testify. So, if a witness has sufficient knowledge, he can speak of credit as a fact, and the extent of it. He cannot speak of its value in dollars and cents. That is a question of inference for the jury to draw. And a witness may testify to the extent of a merchant's business, and the rate or average of profits he may realize on sales, above expenses, if these are matters within his knowledge; but he cannot give his judgment or opinion as to the extent of loss a merchant will suffer by the breaking up of his business. Such question is dependent on so many elements of fact and circumstance, that any estimate that might be attempted would necessarily be opinion, or conclusion. This is a question for the jury, not for direct testimony.

Proof was offered by plaintiff, and received by the court against the objection of defendants, that plaintiff was making advances to timbermen and others, and that thereby he had become interested in the handling of timber and crops; and his mercantile business being stopped, he lost these advantages, lost his advances, and lost the shipment of his timber. These matters of proof, each and all, were inadmissible. There was no averment in the complaint to authorize them, and if there had been, the damages claimed on those accounts are speculative and too remote.

In this case the attachment was sued out by an agent, and there is no proof that the agent was authorized or instructed to sue out the process. Neither is there proof that the principal ever repudiated the suit. It was prosecuted to judgment. This subjected the principal to actual damages, if no cause existed for suing it out. He would not be responsible for the malice, vexatious conduct, or

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wantonness of the agent, unless he caused, or participated in such evil motive. Malice or vexatiousness in the agent, and only in him, does not expose the principal to vindictive damages. *Kirksey v. Jones*, 7 Ala. 622; *McCullough v. Walton*, 11 id. 492. The defendants ought to have been permitted to prove, that previous to the suing out of their attachment, the agent by whom it was done was notified that other creditors of the plaintiff had on that day sued out attachments against him, on the same alleged ground as that set forth in defendant's attachment. This testimony was admissible on the question of exemplary or vindictive damages. It does not bear on the question of actual damages. No matter how well founded the belief of the attaching creditor, that a statutory ground exists for suing out the attachment, if he mistake, or be misinformed, and there be in fact no ground for this extraordinary process, then the attachment is wrongful, and there may be a recovery of the actual damage done. This is measured by the actual injury which the issue and levy of the particular attachment occasioned. It extends no farther.

Several of the rulings of the Circuit Court are not reconcilable with the views expressed above.

Reversed and remanded.

MAYER v. TAYLOR.

(69 Ala. 406)

Mortgage — on unplanted crop.

A mortgage on an unplanted crop conveys only an equitable title, but this attaches instantly on the planting, and is superior to a second mortgage executed prior to the planting, the second mortgagee having notice of the former mortgage. (See note, p. 525.)

ACTION for conversion of cotton. The opinion shows the point. The plaintiff had judgment below.

Head & Butler, for appellants.

Wm. P. Webb, contra.

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SOMERVILLE, J. The subject of mortgages on unplanted crops, not *in esse* at the time of the conveyance or assignment, has been the subject of much discussion, and the adjudged cases are greatly conflicting. Some of them hold that such a mortgage is void, and conveys no title to the crops, either legal or equitable. *Hutchinson v. Ford*, 9 Bush, 318; s. c. 15 Am. Rep. 711; *Comstock v. Scales*, 7 Wis. 159. Others hold that they are valid at law, and good to convey a legal title. *Arques v. Wasson*, 51 Cal. 620; s. c., 21 Am. Rep. 718; *Robinson v. Ezzell*, 72 N. C. 231; Jones on Chat. Mortg., § 143. Neither of these extreme views, however, has been adopted by this court. Its doctrine in reference to this subject is now firmly settled, that a mortgage executed by the owner, or the lessee of land, on a crop which is not planted, but is to be planted in *futuro*, conveys to the mortgagee a mere equitable interest or title, which will not support an action of detinue, trover, or trespass. *Grant v. Steiner*, 65 Ala. 499; *Rees v. Coats*, id. 256; *Booker v. Jones*, 55 id. 266; *Abraham v. Carter*, 53 id. 8. This view is, in our opinion, supported by the weight of authority. *Moore v. Byrum*, 10 S. C. 452; s. c., 30 Am. Rep. 58, and note, 63; *Fonville v. Casey*, 1 Murph. 389; 4 Am. Dec. 559, note, 560; *Sellers v. Lester*, 48 Miss. 513; and other cases cited in *Grant v. Steiner*, *supra*.

The principle lying at the basis of these decisions is, that a thing having a potential existence may be mortgaged or hypothecated. By potential existence we understand a present interest in property, of which the thing sold or conveyed is the product, growth or increase, as opposed to a mere possibility or expectancy, not coupled with such an interest. Benjamin on Sales, § 78; *Low v. Pew*, 108 Mass. 347; s. c., 11 Am. Rep. 357. Hence an assignment of future wages, there being no existing contract of service, is invalid; but the assignment is good where there is such a contract of service. *Mulhall v. Quinn*, 1 Gray, 105. It is commonly said that a man may sell the wool to be clipped from his sheep at a future time, or the milk his cows may yield in the coming month or year, and the sale is valid; but not so as to the wool of any sheep, or the milk of any cow which he may acquire at any time in the future, even though it be but the next hour. Benjamin on Sales, § 78. The clear distinction is that in the latter cases, the subject of the contract is not *in rerum natura*, or as is commonly said, *in esse*.

"Land is the mother and root of all fruits. Therefore he that

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hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant." *Grantham v. Hawley*, Hobart, 132. There can be no valid distinction between the wine a vineyard is expected to produce, and the grain or cotton a field is expected to grow, except as to the relative amount of skill and personal labor that may be expended in the two cases. Each is the product of property, owned *in præsenti* by the vendor in the case of a sale. Story on Sales, § 183. In *Andrew v. Newcomb*, 32 N. Y. 417, it was said: "In the case of crops to be sown it [the title] vests potentially from the time of the executory bargain, and actually as soon as the subject arises." In other words, the lien attaches *eo instanti*, when the property comes into existence. They come into being together and co-exist, and equity executes the contract by holding that done which is agreed to be done. So soon as the crop, or other thing mortgaged exists, the vendor, or his assignee with notice, becomes a trustee holding the legal title for the benefit of the mortgagee. And whenever this equitable ownership, or interest, is once established, the courts will interpose for its protection. *Sillers v. Lester*, 48 Miss. 513.

It is plain from these principles that the mortgage executed by Pendergrast to the appellees, Taylor & Co., on February 5, 1880, conveyed to the latter an equitable title or interest in all the crops raised during the current year, on the lands, by the mortgagor or "by his procurement."

The question presented is, whether he can be permitted, before the planting of the crops and after making this conveyance, to assign an interest in them to a third person, to the prejudice of the lien already created in favor of the first mortgagees. The evidence shows that soon after making the mortgage to Taylor & Co., Pendergrast formed a copartnership with a Mrs. Kelley for the cultivation of the lands of which he was then in possession, and on which the six bales of cotton in controversy were grown, and that the two contributed work and labor jointly, under the agreement that the profits in the business were to be equally divided between them as partners, carrying on the farming business under the firm name and style of Kelley & Pendergrast. The partnership mortgaged the property on May 14, 1880, to the appellants, Mayer & Co., and delivered the cotton to them the following fall, they having notice of the prior mortgage to Taylor & Co. The contention is between the lien of the two mortgages.

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Our opinion is that, under this state of facts, the interest taken by Mrs. Kelley in the crops to be grown was taken subject to the equitable lien already created, and of which she had notice. The contribution made to the partnership by Pendergrast was the land with its potential capacity for future products, and his teams and personal services. These were already subject to the operation of an agreement creating an equity against them. When the products or crops came *in esse*, the mortgagor was to hold the legal title as trustee for the first mortgagees. The interest assigned to the partner, who was let in, was an undivided half interest as tenant in common of every thing produced. The assignee, Kelley, could acquire no greater interest than the assignor had, and must therefore have taken it *cum onere*. *Nemo plus juris ad alium transferre potest quam ipse habet*. (Coke Litt. 309 b.) As between the conflicting liens of the two mortgages, we see no reason which rescues them from the operation of the maxim, that "he who is first in time is stronger in right." The mortgage given to the defendants, Mayer & Co., being taken with full notice of the mortgage previously executed to the plaintiff was subordinate to it, and the court ruled correctly in so charging.

The judgment affirmed.

Judgment affirmed.

STONE, J., dissented.

NOTE BY THE REPORTER.—In *Collins v. Faulk*, 69 Ala. 56, it was held that a mortgage on unplanted crop for future advances is equitably valid. The court said :

"The question has been much discussed as to how far mortgages of this character for future advances are good, and what should be the nature of their recitals. It seems to be clearly settled, that if they are not tainted with fraud or bad faith they are just as valid as if made to secure past indebtedness, not only as between the parties, but also as against subsequent purchasers and incumbrancers, so far at least as respects advances made before the equities of such purchasers or incumbrancers have attached. *Dwyer v. McLaughlin*, 3 Wend. 506; 20 Am. Dec. 655, and note; *Hubbard v. Savage*, 8 Conn. 215; *Lovelace v. Webb*, 63 Ala. 371; *Summers v. Rose*, 42 Miss. 149; s. c., 2 Am. Rep. 658; *Com'l Bank v. Cunningham*, 24 Pick. 370; 35 Am. Dec. 338; *Robinson v. Williams*, 23 N. Y. 330; *Ward v. Cooke*, 18 N. J. Eq. 96; 4 Wall Act. & Def. 541-42." To same effect, *Williamson v. Kettler*, 69 Ala. 435.

WOLFFE V. WOLFF.

(99 Ala. 549.)

Landlord and tenant — holding over.

A tenant for years who holds over for only a few days may be treated as a tenant for another year, the landlord having given him notice to quit, although he has refused to renew the lease, and has notified the landlord that he has rented other premises; and he is not relieved by the fact that the other premises were not ready for him.

ASSUMPSIT for use and occupation of a storehouse. The opinion and head-note show the point. The plaintiff had judgment below.

Rice & Wiley, for appellant.

Watts & Sons, contra.

SOMERVILLE, J. The principle is too well established for further controversy, that where a tenant for years holds over after the expiration of his term, the law will imply an agreement to hold, or continue the lease, for another year, upon the terms and conditions of the prior lease. It is the duty of a tenant, so soon as the period of his tenancy expires, to peaceably surrender the possession of the demised premises to his landlord, and if he neglects or refuses to do so, the landlord may treat him either as a trespasser or as a tenant, according as his own option may dictate. Taylor Landlord and Tenant, § 22; *Schuyler v. Smith*, 51 N. Y. 309; a. c., 10 Am. Rep. 609; 4 Wait Act. and Def. 218, § 5.

In all such cases, where there is a holding over by the tenant, the right of the landlord to insist upon the continuance of the tenancy is in nowise affected by the fact that the tenant refuses to renew the lease, and gives notice that he has rented other premises with the expressed intention to vacate within a few days. The tenant cannot be permitted to enjoy the benefits of continued possession, and at the same time capriciously repudiate the attendant burden of paying just and reasonable rent. Though he may expressly refuse to promise, the law raises such obligation on his part by necessary implication, if the landlord elects to still

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regard him as a tenant. *Schuyler v. Smith*, 10 Am. Rep. 609, *supra*; *Taylor Land. and Ten.*, § 22; *Hemphill v. Flynn*, 2 Barr (Penn.), 144; *Bacon v. Brown*, 9 Conn. 334; *Neel v. McCrory*, 7 Cold. (Tenn.) 623; *Harkins v. Pope*, 10 Ala. 493; *Schuisler v. Ames*, 16 id. 73.

In the case of *Witt v. Mayor of New York*, 5 Robt. (N. Y.) 248; s. c., 6 Robt. 441, the tenants gave notice to their landlord that they had hired other premises, and expressly declined another year's tenancy. They held over twelve days, during which time they were engaged in effecting a removal. They were adjudged to be liable for another year at the election of the landlord. A similar ruling was announced in *Conway v. Starkweather*, 1 Denio, 113, where the tenant held over without authority for the space of two weeks, and it was held to be immaterial that the tenant gave notice that he had hired other premises, and communicated to the landlord his determination not to hold over another year.

The form of action in such cases, it seems, may be either for use and occupation, arising from an implied assumpsit, or an action on the case for special damages. *Bramley v. Chesterton*, 2 C. B. (N. S.) 592; *Crommelin v. Thwiss*, 31 Ala. 412.

Under these principles, we can see no error in the rulings of the Circuit Court as appearing in the record. The appellant had been the tenant of the appellees for several years prior to October 1, 1879, holding from year to year. He had timely notice that the premises in controversy had been leased to another tenant for the following year, and that he was required to vacate by the 1st of October, 1879, which was the day of the expiration of his tenancy. It was his fault, not the fault of his landlords, the appellees, that he was unavoidably prevented from moving by the incomplete condition of the premises which he purposed to occupy for the ensuing year. His holding over for ten days fastened on him an obligation to pay rent for the whole year, and it was not sufficient to tender a mere *quantum valebat* for the period of actual occupancy, especially in view of the fact that the appellees had expressly notified him that if he persisted in holding over, they would elect to charge him as a tenant for the next ensuing year. And it is further manifest, that by reason of this act on the part of appellant, the appellees lost the opportunity of obtaining a tenant, as they might otherwise have done.

The renting of the premises *ad interim* by Moses Bros. to Hertz,

"on account of whom it might concern" did not affect the merits of this case. It was done with the consent and knowledge of both parties to the suit, and was understood expressly to be without prejudice to the rights of either party.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

SHIPMAN V. FURNISS.

(69 Ala. 555.)

Fraud—confidential relations.

When a young man, who had impaired his mind and body by dissipation, gave all his property, to the exclusion of his kindred, to a prostitute, who had a strong influence over him, and with whom he had lived as a husband under a marriage ceremony void by reason of her prior marriage to another still living, the deed was set aside, for the reason that if the grantor believed his marriage to be valid the deed was fraudulent, and if he knew the marriage to be void it was founded on the illegal consideration of illicit intercourse. (See note, p. 537.)

BILL to set aside deed. The opinion states the case. The plaintiff had judgment below.

Brooks & Roy and Reid & May, for appellants,

Pettus, Dawson & Tillman, contra.

SOMERVILLE, J. The bill in this cause was filed by the appellee, as contingent remainderman, under the will of her grandfather, Joel E. Mathews, Sr., deceased, for the purpose of setting aside a deed of gift to certain lands executed by Joel E. Mathews, Jr., the son of Joel E. Mathews, Sr., to one Kenney, as trustee for Mary A. Shipman, *alias* Mathews, on the alleged ground of fraud and undue influence, averred to have been used in procuring its execution. It is sought to have the deed cancelled as a cloud on the appellee's title.

The salient facts of the case may be succinctly stated as follows: Mary A. Shipman, formerly Mary Kenney, was lawfully married to John A. Shipman, in December, 1865, in the State of Georgia.

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After living with him for a few years, she abandoned him clandestinely under circumstances indicating both her lack of chastity and honesty, and soon took refuge in a house of prostitution. She is shown to have been a woman of personal beauty, attractive manners, and of more than ordinary intelligence, shrewdness and will power, and seems to have unremittingly plied her vocation as a prostitute up to the transactions detailed in the bill.

While in the city of Selma, Alabama, in a house of ill-fame, she formed the acquaintance of Joel E. Mathews, Jr., the grantor in said conveyance, who is shown to have been a young man of most reputable relationship, and of considerable wealth, but a slave to drunken, immoral and dissolute habits. An illicit intimacy sprang up between the two, and all the facts evince that Mathews was possessed of an inordinate infatuation for the woman, and that he was daily brought more and more under the dominations of the unlawful influence. Believing her to be a single woman, he followed her to Georgia, and went through the formalities of a clandestine marriage with her, in the town of Marietta, on the 11th day of April, 1876. They afterward returned to Selma, and openly continued the adulterous intimacy, until the date of Mathews' death, in January, 1878, he publicly claiming her as his lawful wife, and taking her to reside with him at his plantation near Selma, in the county of Dallas, the premises conveyed to her in the deed of gift, and which are here in controversy.

This conveyance was executed on December 19, 1876, and the consideration of it is recited to be natural love and affection for the grantee as his wife, and the nominal sum of one dollar. It swept away substantially all of the grantor's property, leaving him nothing, and was withheld from the record until the death of the grantor, after which it was registered. Mrs. Shipman's own attorney drafted the instrument, and she accompanied Mathews to the city, and also to the attorney's office, both when instructions were given for its preparation, and at the time when it was signed. The evidence fails to show that any compulsion was used, tending to overcome the free agency of Mathews at the immediate time the deed was signed, but his habits of frequent and excessive intoxication, and sexual indulgence seem to have impaired both his mental and physical condition previous to this time. Facts had been brought to his knowledge, prior to this period, which probably caused him to seriously doubt the legality of his marriage, but he

seems to have continued to act upon the theory of its validity, and during the following year allowed the reputed wife to institute proceedings in a court of chancery to have herself declared a "free dealer," under the provisions of the statute authorizing married women to be made free dealers.

The evidence further discloses, that Mrs. Shipman, both before and after the pretended marriage with Mathews, was continuously and openly on terms of intimate and illicit relationship with one William A. Owen, who is proved to have been a man of dissolute habits, quarrelsome nature, and of overbearing and domineering disposition. He seems to have been the constant associate of both Mrs. Shipman and of Mathews, and by his force of character and harsh treatment, to have acquired great influence with the latter. All the circumstances of the case are persuasive to show further, that he was at all times a ready and pliant instrument in her hands. Both Owen and the woman are shown to have encouraged Mathews in his habit of drunkenness, until by excessive indulgence in strong drink he was soon brought to his grave.

The testimony of the witnesses is given in great detail, the history of the alleged transaction covering more than nine hundred pages of a voluminous record, but the facts need not be further discussed for the purposes of this decision.

After stating the circumstances under which the deed was signed, the complainant avers, on information and belief, in substance, that the deed never was in fact delivered, and was for this reason inoperative to convey the land; but that if she is mistaken in this, and the deed was delivered, it was not delivered until several months after it was signed, and that its delivery was procured by the fraud and undue influence by which Joel E. Mathews, Jr., was induced to sign it. It is also averred that the defendant, Mary A. Shipman, was in possession of the lands, holding them and claiming title thereto under said deed. The defendant demurred to the bill on the ground that the complainant had an adequate and complete remedy at law. At the hearing a motion was also made to dismiss the bill for want of equity. The chancellor overruled both the demurrer and the motion to dismiss, and caused a decree to be entered granting the complainant the relief prayed, basing his decree upon the conclusion reached by him, that the facts charged and proved established a case of undue influence.

The demurrer was, in our opinion, properly overruled. If the

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execution of the deed was procured by undue influence, it is clear that it would be voidable, and not absolutely void. In such case, she could not maintain an action of ejectment for the recovery of the lands; and being without remedy at law, she may, under the averments in the bill in this cause, come into a court of equity to have the deed cancelled as a cloud on her title, notwithstanding the fact that she is out of possession. It is true, that the jurisdiction of a court of equity cannot be invoked, when the sole ground of equitable interference is the removal of a cloud from the title, unless the complainant is, at the time, in possession. *Arnett v. Bailey*, 60 Ala. 435. But the rule is different when other distinct grounds of jurisdiction are averred. In such case, a court of equity, having assumed jurisdiction for any one purpose, will retain it, that the whole litigation may be settled, and complete justice be done between the parties. 1 Story Eq. Jur., §§ 228-9; *Lockett v. Hurt*, 57 Ala. 198; *Ray v. Womble*, 56 id. 32.

There is no objectionable repugnancy in the two aspects presented by the bill touching the execution and delivery of the deed. In either aspect, whether it was in fact delivered, or whether it was merely signed and not delivered, but surreptitiously obtained from the papers of Joel E. Mathews, Jr., after his death, or from him while living — the deed having been recorded, and being in the hands of the defendant, Mary A. Shipman, who was in possession, claiming title under it — it would be a cloud upon complainant's title; and in either aspect, if the signature or delivery was procured by undue influence exercised by the defendant over the grantor, the relief to which the complainant would be entitled is precisely the same. *Micou v. Ashurst*, 55 Ala. 607; *Rapier v. Gulf City Paper Co.*, 69 id. 476.

The majority of the court however, without committing themselves to all that is said above, hold that the statements of the bill do not bring this case within the principle declared in cases of alternative or disjunctive averments. According to their opinion, the bill contains two distinct, independent grounds on which the claim of relief is based; and that if either ground is sufficient, its force is not impaired by the fact that it is joined cumulatively with another alleged ground, which of itself will not maintain the equity of the bill. They concur in the conclusion reached, that the demurrer to the bill and the motion to dismiss for want of equity were properly overruled.

The main question in this case, and upon which its decision must depend, is the doctrine of undue influence as affected by unlawful and illicit relations existing between the donor or donee at the time of executing the deed of gift in question. The jurisdiction exercised by courts of chancery in setting aside voluntary donations or other contracts, in the case of parties bearing confidential relations toward each other, is a familiar and salutary one, and is based upon well-recognized principles of a sound public policy. 3 Lead. Cases in Eq. (H. & W.) 111. And while in *Dent v. Bennett*, 4 Myl. & Cr. 269, Lord COTTENHAM declined to make any enumeration of the particular class of persons whose mutual dealings in this regard ought to be watched with jealousy by the courts, it seems now settled that the rule is not confined to relations strictly fiduciary, but applies to "all the variety of relations in which dominion may be exercised by one person over another." *Huguenin v. Basley*, 14 Vesey, 273; s. c., Lead. Cases in Eq. (H. & W.) 111 (462, 486); *Bayliss v. Williams*, 6 Cold. 440; Kerr on Fraud and Mistake, 192, 193; Bigelow on Fraud. 129, § 21.

It has been frequently, and as we think, most properly, exercised in the case of illicit relationships existing between donors and donees, and even testators and devisees, especially where they originated in an abortive attempt at a lawful marriage. For such a relationship, especially if continued under the outward conventionalities of lawful marriage, would manifestly be of a confidential nature.

It is true, that as between a lawful husband and wife, the better opinion is, that a liberal donation by the one to the other will not warrant of itself a presumption of undue influence, unless there is something suspicious in the circumstances, or the nature or magnitude of the gift is such that it ought not to have been accepted. *Small v. Small*, 4 Me. 220; 3 Lead. Cases in Eq. 144. And it may be further admitted, that in the case of benefits received under wills, the bare proof of an unlawful cohabitation between the testator and a devisee would not alone ordinarily raise a presumption of undue influence sufficient to avoid the will. *Wainwright's Appeal*, 89 Penn. St. 220. In *Farr v. Thompson*, Cheve (S. C.), 37, the same rule was announced as applicable to a case where a testator bequeathed all of his property to a kept mistress, to the exclusion of his nephew and other relations; but the decision is criticised and its authority doubted by the annotator of the *Leading Cases in Equity*, 3d vol., p. 146.

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There can however be no question about the fact that the same rule does not apply with equal force to benefactions received under wills and deeds of gift, but that there exists a well-grounded distinction between the two classes of instruments. Stronger proof is, and manifestly should be, required to raise a presumption of undue influence in the case of a will than of a deed or contract, for the former, unlike the latter, can never take effect until the giver is dead, and therefore in a condition utterly incapacitating his further enjoyment or use of the subject of his testamentary disposition. Improper influence may be often inferred to have operated in producing gifts, where the same evidence would fail to authorize such an inference in case of a legacy or devise. Lord ELDON declared in *Gibson v. Jeyes*, 6 Ves. 266, that "whenever a person obtains by voluntary donation a large pecuniary benefit from another, the burden of proving that the transaction is righteous falls on the person taking the benefit," and it has always been held that the improvidence of the transaction, generally in the case of both gifts and contracts, is a cogent circumstance showing fraud or undue influence. *Harvey v. Mount*, 8 Beav. 439; *Cooley on Torts*, 515, 516; *Clarke v. Sawyer*, 3 Sandf. Ch. 351, 425; *Jennings v. McConnell*, 17 Ill. 148; 3 Lead. Eq. Cases, 141, 145; *Daniel v. Hill*, 52 Ala. 430.

What constitutes undue influence is a question depending upon the circumstances of each particular case. It is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded. But it is evident that its exercise may be inferred in all cases of confidential, or *quasi* confidential, relationship, where the power of the person receiving a gift or other like benefit has been so exerted upon the mind of the donor, as by improper acts or circumvention to have induced him to confer the benefaction contrary to his deliberate judgment, reason and discretion. *Bigelow on Fraud*, 283; 1 Redf. on Wills, 530.

The following principle, we think, is sound both in law and morals, and though a departure from the former rule, is sustained by the more modern authorities. When one, living in illicit sexual relations with another, makes a large gift of his property to the latter, especially in cases where the donor excludes natural objects of his bounty, the transaction will be viewed with such suspicion

by a court of equity, as to cast on the donee the burden of proving that the donation was the result of free volition, and was not superinduced by fraud or undue influence. How much further the principle may be extended, if any, it is neither our province nor purpose now to consider.

This doctrine is fully sustained by Judge Cooley in his work on Torts, and receives the approval of other eminent jurists and text writers. Cooley on Torts, 515; Bigelow on Fraud, 271; 1 Redf. on Wills, 532-4; 3 Lead. Cases Eq. 146.

The Supreme Court of Iowa also gave it an unqualified approval in *Leighton v. Orr*, 44 Iowa, 679, and re-affirmed it in *Hanna v. Wilcox*, 53 id. 547. These cases hold the doctrine that influence obtained by a woman over a man, with whom she is living in unlawful cohabitation, is undue influence, and where he makes a conveyance of valuable property to her during its continuance, on the recital of a merely good consideration, a court of equity will intervene to set it aside on the ground of having been procured by undue influence, in the absence of evidence showing it to be fair and free from fraud. In the latter case the court say: "The exercise of unlawful influence will be presumed when the parties to a deed live in adulterous relations, in the absence of proof of a lawful consideration. These rules are in accord with sound reason and legal principles. Their application will tend to restrain immorality. No paramour should be permitted to enjoy the wages of her sin, which she obtains through the generosity of her victim, stimulated by her ministry to his passions." *Hanna v. Wilcox*, *supra*.

In *Dean v. Negley*, 41 Penn. St. 312, the same principle was applied to a devise by a testator under a will, so far as to hold, that upon an issue to determine the validity of a will, where it was shown by the contestants that the testator was living in open adultery with a woman to whose children he devised the bulk of his estate, these facts would afford a strong presumption of the exercise of undue influence upon the mind of the testator, and would authorize a verdict against the will. This case seems however not to have been followed to its full extent in the later case of *Wainwright's Appeal*, 89 Penn. St. 220.

In *Bivins v. Jarnigan*, 3 Baxt. 282, the Supreme Court of Tennessee followed the doctrine announced in *Dean v. Negley*, *supra*, and set aside a deed of gift, executed by a man living in adulterous relations with the donee, by which he conveyed to her

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a large part of his property in consideration of love and affection. The court say: "We think in such case there does arise a strong presumption that the deed was obtained by an undue influence and power the woman had obtained over him" (the donor), and for this reason the court set aside the deed.

The Supreme Court of Indiana, in *Kessinger v. Kessinger*, 37 Ind. 341, held that an influence in procuring the execution of a will might well be considered illegitimate and undue, when exercised by a woman living on terms of illicit intimacy with the testator, which would be regarded as lawful and proper when exercised by a wife.

The principle under discussion seems to have been carried still further in a recent and well-considered English case, that of *Coulson v. Allison*, 2 De G., F. & J. 521. Here a widower had consummated a marriage with the sister of his deceased wife, which under existing laws was illegal and absolutely null and void. It was represented to her as a matter of doubt whether her marriage was valid or not, and during the illicit relationship she made a settlement upon the reputed husband of a considerable part of her estate. On bill filed to set aside the conveyance, it was held by the lord chancellor that under the facts the *onus* was on the donee of showing that at the time the woman entered into the transaction she was fully, fairly and truly informed of its character, and of her legal *status*; and further, that such a marriage and cohabitation was not a sufficient consideration to support the conveyance, which was executed by the woman in the capacity of wife, and purported to be a post-nuptial settlement. The court ordered the deed to be delivered up and cancelled without proof of any threats, pressure or solicitation having been brought to bear on the mind of the donor. It was said by the lord chancellor:

"The moving consideration of the deed was clearly the notion of a valid existing marriage. This is shown by the wording of the deed, every syllable of which proceeds upon the footing of a supposed subsisting marriage, and it is further shown by her executing it and acknowledging it in the character of a married woman. But supposing even both Nicholson and Ann Welbank (the donor and donee) to have been aware of the true state of the law, and to have nevertheless agreed to cohabit together, she being the mistress and not his wife, it seems to me the deed would then have been impeachable on the ground of immorality, for nothing

can well be conceived more immoral than for a woman to make over the whole of her property to a man in contemplation of continuing an illicit intercourse with him for the remainder of their joint lives."

The principles above discussed apply with great force to the case under consideration. Here is a deed of gift made by a young man diseased with a consuming passion for strong drink and lewd dissipation, the excessive indulgence in which is shown to have impaired both his mind and body. It sweeps away by a stroke of his pen all of his property, including the very roof sheltering his head. The beneficiary is a common prostitute, who is preferred to the exclusion of the donor's own blood relations. And the harsh influence of a bad and daring man—a rival paramour—is artfully made subservient to the accomplishment of her purposes. Such transactions not only challenge the duty of the courts to watchfulness and jealousy in scanning the appliances by which they have been procured, but are persuasive to impress the judicial mind with a conviction that the will and reason and judgment of the donor were brought under illegitimate constraint in producing so unnatural a result. The chancellor so found by his decree, and we do not feel authorized under the evidence to reverse his finding.

There is another view of this case not considered by the chancellor, which we think would compel an affirmance of his decree. The deed of gift, made by Joel Mathews, and which is here assailed, was executed by him either with an honest belief that his marriage was lawful and valid, or else that it was unlawful and adulterous. If the first supposition be true, the deed was executed upon the false and fraudulent hypothesis that the donee was his lawful wife, and could for this reason be avoided as having been procured by artifice, circumvention and fraud. *Coulson v. Allison*, 2 De G., F. & J. Eng. Ch. 521. If the other supposition be true, the donor being aware of his illicit relationship to Mrs. Shipman, the conveyance must be construed, under all the facts of the case, to have been made in contemplation of the continuance between the parties of their adulterous intercourse, and this would present the case of an executed contract upon an illegal consideration. And against such a contract a court of equity will often undertake to grant relief, where by undue influence the donee has procured its execution; for in such cases there is no room for the maxim: "*In pari delicto, potior est conditio defendentis.*" *Coul-*

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son v. Allison, supra. This maxim as has been well said, ceases to apply, where "the acts of one of the parties have their origin in the acts or influence of the other, because the wrong then rests chiefly, if not solely, on the person by whom it was contrived; and his confederate will be regarded as a mere tool or instrument for accomplishing an end which was really not his own." 3 Lead. Cas. Eq. 153; *Ford v. Harrington*, 16 N. Y. 285; *Long v. Long*, 9 Md. 348.

It may be that the views announced in this case constitute a slight modification of the doctrine of undue influence as anciently held by the earliest authorities. But the instances are numerous and familiar, where the common-law principles have undergone like modifications, adapting themselves, by force of their elasticity, at one time to the exactions of a sounder reason, and at another time to the demands of a more exalted morality. We recall notably the law of uncommunicated threats, equitable estoppels, duress by menaces of property, and the testimony of husband and wife for and against each other. In each of these cases the law has gradually undergone a wise and most commendable mutation.

It is the duty of the courts we think to encourage those doctrines and currents of decisions which are supported by a sound public policy, as far as authority and reason will permit. It was the boast of Sir Edward Coke concerning the common law, as it before had been of Cicero regarding the Roman law, "that it was the perfection of reason." It will challenge claim to a yet higher and worthier admiration, when it becomes also the perfection of true honesty and a high christian morality.

Under the provisions of the civil law the conveyance in this case would be void, and it would be a scandal on justice, if a court of conscience, applying the principles of the common law, should permit it to stand.

The decree of the chancellor, overruling the demurrer and granting the relief prayed in the bill, is hereby affirmed.

Decree affirmed.

NOTE BY THE REPORTER.—The facts in *Leighton v. Orr*, 44 Iowa, 679, were very similar to those in the principal case, with the addition that the woman pretended to be a spiritual medium, and to have daily communications from the grantor's deceased wife. The court said: "Whatever influence Mrs. Orr had over Wolcott, or however intimate and confidential their relations were, she obtained such influence by unlawful means, by ministering to his passions, by adulterous intercourse; their mode and relations in life were disgraceful. Influence obtained by the use of lawful means by a wife or child is eminently right and proper, if exercised with proper and honest motives. But the influence obtained by the

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use of unlawful means, immoral and indecent conduct, is undue influence, and no case should be permitted to derive benefit or advantage therefrom. *Dean v. Nepley*, 41 Penn. St., 312; *Kissinger v. Kissinger*, 37 Ind. 341.

"The unlawful relations existing between these parties — the influence the defendant must have obtained — the confidential relations that must have existed between them — the confidence necessarily reposed — may be well likened to that existing between friend and adviser, physician and patient, or many other relations in life that beget confidence. It matters not what the relation is, if confidence is reposed and influence obtained. Transactions based thereon or obtained thereby will be jealously watched and guarded by courts of equity, and set aside unless the beneficiary shows the *bona fides* of such transaction. 1 Kerr on Fraud and Mistake, 150-1-2 and 183. In *Bayless v. Williams*, 6 Coldwater, 442, this doctrine was held applicable to a contract or conveyance of real estate where friendship and gratuitous service performed for the plaintiff by the defendant was the only confidential relation that existed between them.

"In *Lyon v. Home*, L. R., 6 Eq. 655, a case in principle much like this, it was held the burden was on the defendant to support the deeds or gifts, and that he should satisfy the court they had not been obtained by reason of confidence reposed or undue influence. The defendant in that action was somewhat celebrated as a spiritualist. The plaintiff sought him and thrust her gifts upon him, in consequence however of directions received, as she supposed, through the defendant from her deceased husband. It is true nothing of that kind is shown in the case at bar, but the legal principle announced in the case cited is not placed on that ground. Nor were there in that case, as in this, any illegal or immoral relations existing between the parties. The decision is placed on the ground that owing to the confidential relation existing between the parties, and the influence thereby engendered, the onus or burden of supporting the deeds or gifts was on the defendant."

In *Dean v. Nepley*, 41 Penn. St. 312, it was held that in a feigned issue to determine the issue of a will, the fact that the testator was living in open adultery with the mother of the children to whom he had devised the mass of his property was competent evidence for the jury on the question of undue influence. Lowry, C. J., thought it "raised a presumption of law of undue influence," but the court declined so to decide, and left it as a question of fact. Lowry, C. J., said: "The natural and ordinary influence of an unlawful relation must be unlawful in so far as it affects testamentary dispositions favorably to the unlawful relation and unfavorably to the lawful heirs. * * * There can be no doubt that a long continued relation of adulterous intercourse is a relation of great influence of each over the mind and person and property of the other." This case was distinguished in *Wainwright's Appeal*, 89 Penn. St., 220. There a testator and his residuary legatee had unlawfully cohabited together, and it was alleged that many years previously she had falsely accused testator of seducing her. It was held that these facts were not sufficient evidence of undue influence over the mind of the testator in the testamentary act, where it appeared that the will was properly and formally drawn, and every one but the attorney who drafted it was excluded from the room when the instructions were given; and that such circumstances were not sufficient to justify a jury in finding a verdict against the will. The court said, by SHARSWOOD, C. J.: "It is strongly contended that there were disputed facts disclosed by the evidence from which the jury might have found that an undue influence was exerted over the mind of the testator. It is clearly settled that the constraint which will avoid a will must be one operating in the act of making the will. Threats, violence or any undue influence long past, and not shown to be in any way connected with the testamentary act, are not evidence to impeach a will. *McMahon v. Ryan*, 8 Harris, 39; *Eckert v. Flinory*, 7 Wright, 46; *Thompson v. Kyner*, 15 P. F. Smith, 368. In an issue devised *vel non* on the allegation of undue influence by the mother of an illegitimate child, the legatee in the will, the unlawful cohabitation of the mother with the testator is not of itself sufficient evidence from which a jury could infer undue influence. *Bady v. Ulrich*, 19 P. F. Smith, 177; s. c., 8 Am. Rep. 238. It is true that if there are other facts, unlawful cohabitation may be a circumstance of weight. *Dean v. Nepley*, 5 Wright, 37; *Matn v. Ryder*, 3 Norris, 217. In the case before us there was not a scintilla of evidence of the exertion of any influence over the mind of the testator in the testamentary act. His capacity was perfect, the act was free and voluntary; a respectable member of the bar was called in; everybody was excluded from the room when his instructions were

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given, and the will when afterward drawn in form was executed in the presence of the two witnesses who attested it. There was never a case in which a will was executed less liable to exception on this ground. It is true that the testator and the residuary legatee had never been lawfully married. But for a year, at least, he had cohabited with her as his lawful wife, acknowledging her to be such. He was not on good terms with his brothers and sisters, the present contestants, and on many occasions had expressed his intention of providing for the residuary legatee. It is contended however that she had falsely represented to the testator that he had seduced her. It is more than doubtful whether the letter of May 2, 1874, so much relied on by the appellants, was not the testator's own work, intended to justify him in the eyes of his friends in living with the woman, and it is difficult to believe that he was deceived by it. But concede it to be as contended. How can it by itself justify the conclusion of undue influence in the testamentary act? Say that it was intended by her to induce him to remove her from the condition of a common prostitute and take her under his protection. Why might not her care and attention, her faithful performance of all the duties of a wife, though she did not bear the lawful relation, making his home peaceable and comfortable, produce in him a natural and legitimate affection for her sufficient to account for the not unreasonable provision made for her in his will? It is clear to us that this circumstance alone is not sufficient to justify a jury in finding a verdict against the will."

CRENSHAW v. CARPENTER.

(99 Ala. 572.)

Widow — insanity of, affecting right to dissent from husband's will.

The right of a widow to dissent from a provision made for her in her husband's will in lieu of dower is personal, and if she is insane her right is defeated.*

BILL for dower. The opinion states the case. The defendant had judgment below.

J. B. Head, for appellant.

Wm. P. Webb, contra.

SOMERVILLE, J. The widow of a deceased husband is authorized by our statutes, in all cases, to dissent from his will, and in lieu of the provision made for her by such will, to take her dower in the lands, and such portion of the personal estate as she would have been entitled to in case of the husband's intestacy. Code, 1876, § 2292. "Such dissent must be made in writing, and deposited *within one year* from the probate of the will with the judge

* To same effect. *Crozier's Appeal* (90 Penn. St. 384), 35 Am. Rep. 686; *Van Steenwyck v. Washburn*, Wisconsin Supreme Court, November, 1883.

of probate of the county in which the will is probated, and an entry made of record specifying the day on which the dissent was made. Code, § 2293.

The question presented by the record is, whether the court can create a saving or exception in the statute, in favor of an insane widow, confined in a lunatic asylum of a distant State, where the legislature has failed to make such exception.

Whatever may be said favorable to the justice and humanity of such a provision, the rules of sound construction and the weight of authority are both opposed to the affirmative of the proposition. The subject is fully discussed in *Scribner on Dower*, and the following principle is deduced as the result of the adjudged cases :

“Except where otherwise provided by law, the statutory right of election conferred upon the widow, in cases of the character now under consideration, is regarded as a strictly personal right, and cannot be exercised by another person in her behalf.

“In the application of this rule, it has been held, that the incapacity of the widow to elect by reason of *insanity*, furnishes no sufficient cause for its relaxation.” 2 *Scribner on Dower*, 469, 471.

The language of the statute, as observed by the Supreme Court of Maryland in a similar case, “is comprehensive enough to include every widow, whether sane or insane, and the act [statute] having no exception in favor of the latter, the courts can make none, whether they be courts of law or equity * * * Where the law directs an act to be done, or a condition to be performed for the purpose of conferring a right, that right cannot be acquired if the act is left undone, or the condition is not performed.” *Collins v. Carman*, 5 Md. 503.

In *Lewis v. Lewis*, 7 Ired. 72, a testator died making no provision by his will for his wife who was a lunatic, and it was decided that the committee having charge of her had no authority by law to enter a dissent in her behalf, and she could not by reason of her want of reason dissent herself. So, in *Hinton v. Hinton*, 6 Ired. 274, it was held, that a widow could not renounce her husband's will by attorney, in view of the statutory requirement that she must do so in “open court.”

That the right of dissent in such cases is a personal one, capable of being exercised only by one possessing the requisite reason and judgment, seems fully sustained by authority. 2 *Scribner on Dower*, 471; 2 *Redf. on Wills*, 367; *Donald v. Portis*, 43 Ala. 29;

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Welch v. Anderson, 28 Mo. 293. The legislature nowhere expressly confers on the courts the power to make such election for her in case of her disability to do so, but seems to have remitted the misfortune of her condition to the presumed humanity of her husband, whose highest duty is to provide for her in a manner commensurate with her wants and his own financial ability.

And the courts possess just as little power to create a saving or exception, taking *insane* persons out of the operation of the statute. It is enough to say, that the General Assembly has made no such exception and we have no such power. The fact that lunatics are excepted from the operation of the statute of limitations in certain cases, and to a certain extent, is persuasive of the view that the failure to make a like exception here is not entirely unmeaning. Code, 1876, § 3236; *Demarest v. Wynkoop*, 3 Johns. Ch. 138; 8 Am. Dec. 467; *Collins v. Carman*, 5 Md. 503, 517; *Yniestra v. Tarleton*, 67 Ala. 128.

The will of the deceased husband, in this case, was probated in September, 1862. At the time of his death the widow was insane, and has continued to be so ever since. Her condition, mental and physical, was such that she was incapable of entering such a dissent from the will as the statute requires, and no one is authorized by law to act in her behalf. The chancellor so ruled, in effect, by sustaining the demurrer and dismissing the bill, and we see no error in his rulings. If the case be one strongly appealing for a remedy, it must be afforded by the legislative department, as has been done in many of our sister States. The courts are powerless to enact laws. They can only enforce them as they are already enacted.

Whether the chancery court, on a bill filed within proper time, possesses the power to make an election for an insane widow in cases like this, we do not now decide.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

DE THOMAS V. WITHERBY.

(51 Cal. 32.)

Replevin — property destroyed by act of God.

An execution issued to enforce a judgment for the return of property in replevin, or its value, may not be resisted upon the ground that the property has been destroyed by the act of God.

ACTION to stay proceedings on execution. The opinion states the case. The defendant had judgment below.

Brunson & Wells, for appellant.

Chase, Arnold & Hunsaker, and *Leach & Parker*, for respondent.

MORRISON, C. J. Appeal from final judgment in favor of defendants, on demurrer to the complaint. The following are the material facts in the case :

DeThomas v. Witherby.

In March, 1869, Witherby commenced an action in the District Court of the Eighteenth Judicial District, against one Charles Thomas, for the recovery of the sum of \$2,500, and procured an attachment to be issued therein, which was levied upon certain cattle, including forty-five head of California stock, and two animals known as "graded cows," the latter being of the value of \$1,040 and the entire value of the property being \$1,940. This action was prosecuted to judgment against Charles Thomas. Soon after the seizure of the cattle under the writ of attachment, the plaintiff in this case commenced an action in the same court against Witherby and the defendant Coyne (sheriff of San Diego county) for the recovery of the property attached, the plaintiff in said action claiming to be the owner and entitled to the possession of the cattle. The action was prosecuted to judgment, and it was adjudged and determined therein that the plaintiff, Geneva de Thomas, was the owner and entitled to the possession of all the property in controversy, except forty-five head of California stock valued at \$900, and two cows known as "graded stock" of the value of \$1,040, and as to these cattle it was adjudged and determined by the court that they were at the time they were taken out of the possession of the sheriff, the property of Charles Thomas. The judgment of the court in respect thereto was that "the said defendants, Joseph Coyne and O. S. Witherby, have and recover of and from the plaintiff (Geneva de Thomas) said forty-five California stock and said two graded cows, if a return thereof can be had; and in case a return cannot be had, that they have and recover from said Geneva de Thomas the sum of \$1,940, that being the value thereof, and damages assessed at one dollar, with costs of suits."

It is further alleged in the complaint that on the 19th day of August, 1880, Joseph Coyne and O. S. Weatherby procured to be issued from the Superior Court (the successor of the former District Court) a writ of execution in the action of Geneva de Thomas against them, directed to T. C. Stockton (another defendant herein, the coroner of San Diego county), commanding and requiring him to take and deliver to said Coyne and Witherby the possession of the forty-five head of California cattle and the two graded cows, or in case delivery thereof could not be had, to make the sum of \$1,941 out of the personal property of Geneva de Thomas, if sufficient personal property of hers could be found, otherwise

to make that amount out of the real property belonging to her, situate in the county of San Diego, which execution was delivered to the defendant, Stockton.

It is further alleged in the complaint, that on the third day of September, 1880, Witherby and Coyne elected to take, and the plaintiff in this action elected to pay the sum of \$900 in lieu of the return of the forty-five head of California stock — that sum being the value thereof as fixed by the judgment of the court — and that sum was accepted and received in satisfaction *pro tanto* of the execution issued on the judgment in the action of replevin, leaving the execution in the hands of the coroner unsatisfied as to the two graded cows and the sum of \$1,040, fixed by the judgment of the court as the value thereof.

It is also charged in the complaint that the coroner now threatens to execute the writ and to enforce the execution of the judgment for that part of it which remains unsatisfied. “Plaintiff further states and shows that she resides about one hundred miles from the county seat of San Diego county; that after the trial and submission of said action of *Geneva de Thomas v. O. S. Witherby and Joseph Coyne*, and before the rendition and docketing of said judgment, or the issuing of said writ of execution, to wit: on or about the 29th day of January, A. D. 1880, the said two cows known as ‘graded stock,’ died, thereby rendering it impossible for plaintiff to return said cattle to said defendants; that said two cattle, from the time they were so delivered to her by said sheriff as aforesaid, up to the time of their death remained in the care and custody and possession of plaintiff, and during all of said time, they at all times continuously received all prudent, proper and necessary care, and that the death of said cattle, and each thereof, was caused by the act of God, and did not occur by any default, abuse, neglect, mismanagement or want of care on the part of this plaintiff, or of any other person.

“Wherefore plaintiff asks the judgment of this court directing return of said execution without further levy or proceedings against plaintiff thereunder; that no further or other writ ever issue upon said judgment, and that plaintiff be adjudged and decreed to have fully done and performed all the acts on her part to be done and performed, and be wholly absolved from further costs or liability by reason of said judgment, and that defendants, and each and all of them, be forever enjoined from any further pro-

ceedings thereunder, and for such further and other relief in the premises as shall be agreeable to equity and good conscience, and for costs of suit."

To the complaint a demurrer was interposed on behalf of the defendants, which was sustained, and the plaintiff declining to amend, a final judgment was entered thereon. From that judgment plaintiff prosecutes this appeal.

There are two questions presented in this case, the first of which is, do the matters set forth in the complaint entitle the plaintiff to any relief whatever, and second, if they do, will a court of equity grant relief under such a state of facts as the complaint sets forth? In other words, was the plaintiff not obliged to apply in some mode or other for relief to the court in which the action of replevin was pending, and by a proceeding in that case? It is suggested on behalf of the respondents that if the rights of the parties were in any manner affected by the death of the graded cows, it was the duty of the plaintiff to have brought that fact properly before the court prior to the rendition of the judgment, if there was time to do it, and if the plaintiff did not have an opportunity before judgment, then she should have made her application for a new trial, upon proper showing, by affidavit.

In the view we have taken of the case it will not be necessary however for us to pass upon the latter question. The action of the plaintiff was brought under sections 509 and 510 of the C. C. P., which provides for actions to recover the possession of personal property, and the delivery thereof to the plaintiff. It is a statutory proceeding analogous to the common-law action of replevin, and by section 667 of the same Code it is provided that "if the property had been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had."

When it appears on the trial that the property has been destroyed, that it no longer exists in specie, and cannot therefore be returned, a judgment for damages alone will not be reversed. *Brown v. Johnson*, 45 Cal. 76.

In some of the cases to which we have been referred, it has been held that the plaintiff, who obtains the possession of personal property by replevin, is excused from returning the same in case it has died since the seizure, without any neglect or default on the part of the party taking it. This was the doctrine laid down by the

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Supreme Court of New York in *Carpenter v. Stevens*, 12 Wend. 589. It was there held that "when property taken by virtue of a writ of replevin is a living animal, and there is a judgment of *re-torno habendo*, in an action on the replevin bond for a breach of its condition, it is a good plea in the bar that before the judgment in the replevin suit, the animal died without the default of the plaintiff in such suit;" and to the same effect is the case of *Melvin v. Winslow*, 10 Me. 397. But an examination of more recent cases and later authorities convinces us that the above cases do not lay down the correct rule on this subject.

The case of *Carpenter v. Stevens*, *supra*, was considered by the Superior Court of New York in the case of *Suydam v. Jenkins*, 3 Sandf. 614, where it is said: "The inferences that have been stated seem to follow in a logical sequence, and if the decision in *Carpenter v. Stevens* were admitted to be law, we should find it difficult to resist them. But this admission we cannot make. The decision is one of those which we regret, but are constrained to say we cannot follow. It appears to us to be wrong in principle, and it is plainly contradicted by many authorities. The undertaking of the plaintiff in the replevin bond, we conceive, is absolute to return the goods or pay the value at the time of the execution of the bond. We cannot think that a wrong-doer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner. * * * A plaintiff who without right or title has seized the property of another by writ of replevin, is as much a wrong-doer as a defendant in trover. No reason can be given why his liability should be less extensive; and in fact when the replevin suit is terminated, although he cannot be treated as a trespasser, he may be sued in trover at the election of the defendant. *Yates v. Fassett*, 5 Denio, 21. The decision in *Carpenter v. Stevens*, is plainly inconsistent with the prior decision of the same court in *Rowley v. Gibbs*, 14 Johns. 385, in which the defendants in a replevin suit in addition to a return of the goods, were held to be entitled to damages for a deterioration in their value, from the time of the replevin, although it was not pretended that the decrease in value was attributable in any degree to the act or default of the plaintiff; and it is irreconcilable with the numerous cases in which it has been held expressly, or by a necessary implication, that in a suit upon the replevin bond, the value of the property, as fixed by the penalty of the bond, is at the election of

the plaintiff the true measure of damages." Citing *Mattoon v. Pearce*, 12 Mass. 406, and numerous other cases.

The case of *Carpenter v. Stevens* is referred to with disapprobation by Wells in his recent work on Replevin. He says: "Questions frequently arise as to the effect the death or destruction of the property pending the suit will have on the rights of the parties. Upon this question the authorities, with few exceptions, can be easily harmonized. It was said in a New York case that when the property sued for is a living animal, and it dies, it is a good plea to say that it is dead. This ruling was based upon the idea that the return had become impossible by act of God; but the ruling has been questioned more than once. To permit a defendant, who wrongfully takes possession, to claim that he holds it at the risk of the real owner, and not at his own, and claim immunity for accident, would be unjust in the extreme. The wrongful taker of property, when called upon to surrender it to the rightful owner or pay the value, cannot defend himself from judgment by showing his inability to deliver it through death or otherwise." §§ 600, 601. The death of slaves, pending the action for them, has often been held not to defeat the plaintiff's right to a judgment for them or their value. *Id.*, § 602; see *Carrel v. Early*, 4 Bibb, 270; *Caldwell v. Fenwick*, 2 Dana, 333; *Scott v. Hughes*, 9 B. Monr. 104; *Drake on Attachment*, § 341; *Hinkson v. Morrison*, 47 Iowa, 167.

Sedgwick in his work on Damages, vol. 2, marginal page 500, also refers with disapprobation to the case of *Carpenter v. Stevens*, and says: "In a case in New York it was decided in a suit on the replevin bond that the non-return of the property was excused by its inevitable destruction before judgment. This decision was based on the old rule that if the condition of a bond became impossible by the act of God, the penalty is saved. But it seems contrary to principle, and has been expressly disapproved of. As between parties to a contract it seems very reasonable that all interested in its execution should bow to the superior power which renders its performance impossible. But it cannot be contended that a wrong-doer should be excused by any subsequent event. Nor do the analogies of the law justify any such decision."

In the case of *Mills v. Gleason*, 21 Cal. 280, the court say: "A failure to prosecute (replevin) is a breach of the undertaking and the legal and necessary result is that the sureties to the undertaking are liable for whatever injury the defendant has sustained."

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It seems to us that the principle laid down by the court in the case above referred to (45 Cal. 76), is applicable here, and is decisive of the present case. There the judgment was for the value of the property and damages merely, and the Supreme Court, assuming that it appeared to the court in which the case was tried that the thing could not be returned, for the reason that it had been destroyed, sustained the judgment.

Perhaps we have given to this case a more elaborate examination than was necessary, but in view of the conflict in the authorities it did not seem improper to refer in some detail to them. The weight of authority is manifestly against excusing the party who has replevied goods from returning the same or responding in damages for their value, because they have been lost by the act of God, and it appears to us that upon no sound principle can he be excused. A plaintiff not being the owner of goods who takes them out of possession of the real owner holds them in his own wrong, and at his own risk. He has deprived the real owner of the possession, and has also deprived him of the means of disposing of the property pending the litigation; and when at the end of perhaps a protracted litigation, it is determined that the plaintiff in a replevin suit had no right to the possession of the goods, and judgment is rendered against him for the return of the property, or its value, he cannot on principle or authority be excused from satisfying said judgment under a plea that the property has been lost in his hands, even by the act of God.

The demurrer to the complaint was properly sustained, and the judgment must be affirmed.

So ordered.

Judgment affirmed.

MYRICK and SHARPSTEIN, JJ., concurred.

People v. Gray.

PEOPLE V. GRAY.

(61 Cal. 164.)

Jury — misconduct — drinking spirituous liquors.

During a murder trial, lasting eleven days, large quantities of beer, wine and whisky were ordered by the jury, at their own expense, and consumed by them, mostly before the submission, but some afterward, without permission of the court and without the knowledge of the defendant. It did not clearly appear that any juror was intoxicated. *Held*, that a conviction must be set aside.*

CONVICTION of murder. The opinion states the facts.

R. B. Canfield, W. T. Wallace, Fox & Rocs and Garber, Thornton & Bishop, for appellant.

A. L. Hart, attorney-general, *R. G. Rowley*, district attorney, *B. F. Thomas* and *C. T. Jones*, for respondents.

THORNTON, J. The defendant was indicted for the murder of one Glancey, and convicted of murder in the second degree. He moved for a new trial, which was denied, and this appeal is prosecuted by him from the judgment and the order denying his motion above mentioned.

[Omitting other points.]

The trial commenced on the first day of June, 1881, and terminated on the morning of the twelfth of the same month, about nine o'clock, when the jury rendered the verdict and were discharged. The jury was fully impanelled on the evening of the third of June, some time after six o'clock. As soon as the jury was complete, they were, by the order of the court, placed in charge of the sheriff and instructed as to their duties. They remained in charge of the sheriff, not being allowed to separate until they were discharged on the morning of the twelfth. After the jury was complete, and before the cause was submitted to them on the afternoon of the 11th of June, about five o'clock, a period of about eight days, four five-gallon kegs of beer were brought into the room at the Tremont House, where the jury was kept by the sheriff, of which

* Contra, *State v. Baber* (74 Mo. 323), 41 Am. Rep. 314.

about seventeen and a half gallons (of the beer) were drunk by them ; that during the same period a two-gallon demijohn of wine was brought in and drunk by them ; that during the same period some of the jurors drank claret wine, amounting to three bottles, at their meals, while some of them drank whisky at their meals ; that all this drinking was done before the cause was submitted to them on the afternoon of the 11th of June ; that on the 11th of June, during the noon recess, two of the jurors procured each a flask of whisky ; that one of the jurors (Price, the foreman) drank nothing. That all the drinking by the jurors was without the permission of the court, or the consent of the defendant, or of the counsel engaged in the cause, and in fact without the knowledge of either of them ; that all the beer, wine and whisky drunk was procured by such of the jurors as desired it of their own motion and at their own expense ; that the verdict was agreed on about eight and a half o'clock on the morning of the twelfth.

Further, the evidence affords strong reason to suspect that one of the jurors drank so much while deliberating on the verdict as to unfit him for the proper discharge of his duty.

The decisions as to how far drinking by a juror while in the discharge of his duties as such, at his own expense, without the permission of the court, or the consent of the party, is such misbehavior that the verdict should be set aside and a new trial granted, are not uniform. In Iowa and Texas no drinking at all is allowed. See *State v. Baldy*, 17 Iowa, 39 ; *Ryan v. Harrow*, 27 id. 494 ; *Jones v. State*, 13 Tex. 168. It is held in these cases that if any liquor is drunk while the juror is in the discharge of his duties, the verdict cannot stand. In each of the cases cited the drinking was done after the cause was submitted to the jury to deliberate on their verdict. In *State v. Baldy*, a juror in charge of a bailiff went to a grocery store to purchase some tobacco, and while there drank a glass of ale or lager beer, and then returned with the bailiff to the jury room.

In *Ryan v. Harrow*, a civil case, two of the jurors drank intoxicating liquors. In *Jones v. State*, the bailiff twice took the jury whisky, which they drank. The verdicts in these cases were set aside. These cases all hold that courts will not inquire whether the juror was affected by what he drank or not ; that the only sure safeguard to the purity and correctness of the verdict is that no drinking shall be allowed. This rule is supported by the following

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cases: *Davis v. State*, 35 Ind. 496; s. c., 9 Am. Rep. 760; *Leighton v. Sargent*, 31 N. H. 119; *State v. Bullard*, 16 id. 139; *Pelham v. Page*, 6 Ark. 535; *Gregg v. McDaniel*, 4 Harr. 367; *People v. Douglass*, 4 Cow. 26; s. c., 15 Am. Dec. 332; *Brant v. Fowler*, 7 Cow. 562.

The law seems to have been settled in New York to the same effect as in Iowa and Texas, until *Wilson v. Abrahams*, 1 Hill, 207, which was a civil case, as its title imports. In that case during the trial and before the cause was submitted to the jury for their consideration, and the jurors were allowed to separate, one of the jurors, during an adjournment for dinner on the second day of the trial, went into a tavern and drank about half a gill of brandy. In the opinion of the court, BRONSON, J., states his conclusion arrived at: "When in the course of the trial a juror has in any way come under the influence of the party who afterward has the verdict, or there is reason to suspect that he has drunk so much, at his own expense, as to unfit him for the proper discharge of his duty, or where he has so grossly misbehaved himself in any other respect as to show that he had no just sense of the responsibility of his station, the verdict ought not to stand. But every irregularity which would subject the juror to censure, whether in drinking spirituous liquor, separating from his fellows, or the like, should not overturn the verdict, unless there be some reason to suspect that the irregularity may have had an influence on the final result."

It may well be doubted whether it was the intention of the court, in *Wilson v. Abrahams*, to establish a rule in capital cases different from that held in Iowa and Texas. We express ourselves in this way in consequence of the guarded language of the opinion. The opinion opens by stating the rule in civil cases — and when it comes to remark on the case of *People v. Douglass*, in 4 Cowen, holding a rule similar to that established in Iowa and Texas, it is said that the case under consideration is distinguished from it, and the feature of distinction first mentioned is that it is a capital case. The cases cited by counsel either follow the rule in the Iowa and Texas cases, or *Wilson v. Abrahams*. If any have gone further in a direction opposed to *Ryan v. Harrow* and *Jones v. State*, above cited, we are not disposed to follow them.

It is not necessary in this case to say which rule should be adopted as the law in this State; but following the rule of *Wilson v. Abrahams*, "that where there is reason to suspect that" a juror

“has drunk so much as to unfit him for the proper discharge of his duty,” the verdict ought not to stand.

In our judgment there is strong reason to suspect this of one of the jurors, and therefore a new trial should be had.

It should be added here that if it is necessary that intoxicating liquors of any kind should be drunk by a juror, application for leave to do so should be made to the court, who can make such allowance as will be proper. Jurors should not be allowed to judge for themselves in this matter. A defendant in a criminal case should not be called on to consent, and in any case when the party consents, if the juror becomes intoxicated, the verdict should not stand. The purity and correctness of the verdict should be guarded in every way, that the administration of justice should not be subjected to scandal and distrust. For the reason above indicated, the judgment and order are reversed and the cause remanded for a new trial.

MYRICK, J. I concur. The evidence contained in the affidavits is conflicting as to whether the juror Winn was intoxicated at the time of the rendition of the verdict, and as the motion for a new trial was denied, the court below must have concluded that intoxication did not exist. But it is an undisputed fact that beer to the amount of three or four kegs was kept in the jury room on tap, and was daily used, and that two gallons and three or four bottles of wine and frequently whisky, was drunk. This was such improper conduct on the part of the jury as calls for a reversal of the judgment, based upon the verdict. A jury is to be provided with suitable and sufficient food. § 1136 Penal Code. It requires no argument to show that the beer, wine and whisky consumed was not suitable and sufficient food.

McKEE, J., concurred with Mr. Justice MYRICK.

McKINSTRY and ROSS, JJ. We concur in the judgment. When some of the jury, in addition to the “suitable” food furnished by the sheriff, obtained and consumed fifteen to twenty gallons of beer, two demijohns of wine, two bottles of whisky, and also other wine and whisky at each meal (including breakfast), they were guilty of such misconduct as made it the duty of the court below to grant a new trial.

SHARPSTEIN, J. [Omitting minor matter.] I think that the introduction of ardent spirits into the jury room while the jury were deliberating upon their verdict constituted miscon-

Druke v. Heiken.

duct *per se*. The sheriff was authorized to provide the jury "with suitable and sufficient food and lodging. Penal Code, 1136. This is a modification of the old rule which required that they should "be kept without meat or drink, fire or candle, until they agreed." But it is the opinion of at least one text writer that "there has been no relaxation as far as drinking intoxicating liquors is concerned." Proffatt on Jury Trial, 398. Whether any juror was so much affected by drinking ardent spirits in the jury room as to temporarily unfit him for the discharge of his duty is not made clear. But it is sufficiently clear that some of them might quite naturally have been more or less under the influence of liquor while deliberating on their verdict, and it seems to me that that is good ground for setting the verdict aside.

Set aside.

DRUKE V. HEIKEN

(61 Cal. 346.)

Gift — causa mortis — note.

An unindorsed negotiable note is subject of a gift *causa mortis*, and carries a collateral mortgage.

THE opinion states the point. The plaintiff had judgment below.

L. S. Taylor and Freeman & Bates, for appellant.

M. C. Barney and I. S. Belcher, for respondents, cited 3 Wait Act. and Def. 503, 506; Redf. Wills, Part II, pp. 305, 312, 313; 2 Kent Com., marg. p. 448 and note; *Grover v. Grover*, 24 Pick. 261; s. c., 35 Am. Dec. 319; *Westerlo v. De Witt*, 36 N. Y. 340; *Bates v. Kempton*, 7 Gray, 382; *Chase v. Redding*, 13 id. 420; *Brown v. Brown*, 18 Conn. 410; *Turpin v. Thompson*, 2 Metc. (Ky.) 420; *Borneman v. Sidlinger*, 15 Me. 429; s. c., 33 Am. Dec. 626; *Ashbrook v. Ryon*, 2 Bush, 228; *Walsh v. Sexton*, 55 Barb. 251; *Pierce v. Boston Savings Bank*, 129 Mass. 425; s. c., 37 Am. Rep. 371.

Ex parte McClain.

THE COURT. If a promissory note, payable to order and not indorsed, is the subject of a gift *causa mortis*, the judgment appealed from must be affirmed, for there is uncontradicted evidence that such a note was given by the decedent as a *donatio causa mortis* to Margaret Heiken, one of the defendants in this action. The authorities cited by respondent's counsel are somewhat numerous, and all support their contention "that a promissory note, payable to order and not indorsed, is the subject of a gift *causa mortis*."

Section 3101 of the Civil Code has not changed the rule in regard to the transfer of negotiable instruments payable to order by indorsement. The assignment of the note carried the mortgage with it.

Judgment affirmed.

EX PARTE MCCLAIN.

(61 Cal. 496.)

Constitutional law — prohibiting sale of intoxicants.

The legislature may make it a misdemeanor to sell intoxicating liquor within two miles of the State prison grounds, or within one mile of the State insane asylum, or within one mile of the grounds of the State University, or in the State capitol, or upon the grounds belonging thereto.

HABEAS corpus. Conviction of misdemeanor. The opinion states the point.

MYRICK, J. The petitioner was convicted of a misdemeanor for violating § 172, Penal Code, and was adjudged to pay a fine of \$25, in default of payment whereof he was restrained by the sheriff. The section reads as follows: "Every person, who within two miles of the land belonging to this State, upon which the State prison is situated, or within one mile of the insane asylum at Napa, or within one mile of the grounds belonging and adjacent to the University of California in Alameda county, or in the State capitol, or within the limits of the grounds adjacent and belonging thereto, sells, gives away, or exposes for sale, any vinous or alcoholic liquors, is guilty of a misdemeanor."

This section was enacted prior to the adoption of the new Constitution, and is unaffected by it.

Estate of Rand.

The power to enact the law in question falls within that large class of powers belonging to the legislature, essential to the promotion, regulation and preservation of the morals, health, prosperity and general well-being of the people of the State. All power rests in the legislature not prohibited by the Constitution of this State or of the United States.

Under the late Constitution it was competent for the legislature to prohibit the sale of vinous or alcoholic liquors within the limits specified in the section, if in its opinion the well-being of the youth being educated at the University, or the discipline and reformation of convicts, or the health of unfortunate insanes, would be thereby promoted or preserved.

Petitioner remanded.

MORRISON, C. J. and ROSS, McKEE and THORNTON, JJ., concurred.

ESTATE OF RAND.

(61 Cal. 468.)

Will — olographic — definition of.

A will consisting in a printed form with the blanks filled in the testator's handwriting is not an olographic will, and no part of it can stand.

PROCEEDINGS to revoke probate of a will. The probate was revoked.

Pillsbury & Titus and J. B. Crockett, for appellants.

Gray & Haven, for respondent.

The COURT. A paper, of which the following is a copy, was admitted to probate as an olographic will, viz. :

"In the Name of God. Amen.

"I, Augustus C. Rand, of the city and county of San Francisco, State of California, of the age of seventy-six years, and being of sound and disposing mind, and not under any restraint or the influence or representation of any person whatever, do make, publish and

Estate of Rand.

declare this my last will and testament in manner following, that is to say:

"First. I direct that my body be decently buried, without undue ceremony or ostentation, but with proper regard to my station and condition in life and the circumstances of my estate.

"Secondly. I direct that my executor, hereinafter named, as soon as he has sufficient funds in his hands, pay my funeral expenses and the expenses of my last sickness.

"Thirdly. I will and bequeath to Mary Ann Babcock, wife of George Babcock, of Oakland, county of Alameda, State of California, all the right, title and interest belonging to me in a piece of real estate situate in Brooklyn township, county of Alameda, State of California, being known as the McCracken ranch, consisting of about sixty-five (65) acres, together with all the improvements and additions that I have made thereunto.

"Also, all my right, title and interest in a house and lot in the city and county of San Francisco and State of California, known as No. 9 Second avenue, with all the improvements and appurtenances thereunto belonging.

"Lastly. I hereby appoint George Babcock, of Oakland, county of Alameda and State of California, the executor of this my last will and testament, hereby revoking all former wills by me made.

"In witness whereof, I have hereunto set my hand and seal this twentieth day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

AUGUSTUS C. RAND.

"The foregoing instrument, consisting of — page besides this, was, at the date thereof, by the said — signed and sealed and published as and declared to be — last will and testament, in presence of us, who, at — request, and in — presence and in presence of each other, have subscribed our names as witnesses thereto.

Residing at —

Residing at —"

The portions of the paper in italic were printed in the form of stationer's blank, and the portions in roman letters were in the handwriting of the deceased, filling the vacant spaces therein. In due time an heir of the deceased moved for revocation of the pro-

Estate of Rand.

bate, on the ground that the paper was not an olographic will, it not being entirely in the handwriting of the deceased, and the court granted the motion. The section of the Civil Code referring to this subject, section 1277, is as follows :

“An olographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this State, and need not be witnessed.”

The paper before us was not entirely written by the hand of the deceased. Portions of it were printed. The legislature has seen fit to prescribe forms requisite to an olographic will, and these forms are made necessary to be observed. It was strenuously urged before us that the portions of the paper which were written by the deceased should be admitted to probate, omitting the printed portions. We are not at liberty to so hold. We should thereby in effect change the statute, and make it read that such portions of an instrument as are in the handwriting of the deceased constitute an olographic will. The instrument, in its entirety, is before us. It was not entirely written by the hand of the deceased.

Order affirmed.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

HOLMES V. NATIONAL BANK OF WILMINGTON.

(18 S. C. 31.)

Bank — National — jurisdiction of action against.

An action may be prosecuted in a State court against a National bank situated in another State, and an attachment may issue before judgment.

ACTION for breach of warranty. The opinion states the case. The defendant had judgment below.

T. M. Mordecai, for appellant.

Simonton & Barker, contra.

SIMPSON, C. J. The defendant, a National banking association in Wilmington, N. C., created under an act of Congress, has been made a party in this action by attachment of its funds in the hands of a National bank located at Charleston. The action proper is an action for an alleged breach of warranty in the sale of certain chattels and personalty by the defendant to the plaintiffs, and the attachment is an incident thereto.

The defendant demurred to the action upon two grounds: 1. That the court was without jurisdiction over the defendant, for that under

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the acts of Congress it is liable only to suits and actions and proceedings brought against it in the State, county or city in which it is located, to-wit, in the State of North Carolina, county of Brunswick, and city of Wilmington, and nowhere else. 2. That it cannot be proceeded against by attachment, because under the acts of Congress no attachment can issue against such corporations before final judgment in any suit, action or proceeding in any State, county or municipal court. Both of these grounds were sustained by the Circuit judge, who dismissed the complaint. The appeal involves the consideration of these grounds of demurrer.

It is conceded that the defendant was an ordinary foreign corporation, that the objections made to the action could not be sustained. It is however contended that the defendant is a corporation created by act of Congress, and being in some degree a financial agent of the United States, that its powers, duties and liabilities are dependent upon the acts which gave it existence, and under these acts it cannot be sued except in the State where it is located. In view of this position, the first inquiry to be made is, what provisions have been made on this subject by Congress in the acts creating such associations.

The first act on the subject of National banks is the act of June 3, 1864, styled, "an act to provide Naational currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." 13 Stat. at L. 99. In section 8 of this act it was enacted that any association formed under this act shall from the date of its organization be a body corporate, having power to adopt a corporate seal, to make contracts, sue and be sued, complain and defend, in any court of law and equity, as freely as natural persons.

Section 52 of this act provides "that all transfers of the notes, bonds, bills of exchange and other evidences of debt owing to any association, or of deposit to its credit; all assignments of mortgages, sureties, or real estate, or of judgments, or decrees in its favor; all deposits of money, bullion or other valuable things for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and

void." Section 57 provides "that suits, actions and proceedings against associations under this act may be had in any Circuit, District or Territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

On March 3, 1873, this act was amended, and especially section 57 above, by adding thereto the following proviso: "*And provided further* that no attachment, injunction or execution shall be issued against such association or its property before final judgment in any such suit, action or proceeding in any State, county or municipal court." 17 Stat. at L. 603.

On June 27, 1866, Congress passed an act to provide for the revision and consolidation of the statute laws of the United States 14 Stat. at L. 74. The commission appointed under this act having reported, an act was passed December 1, 1873, in conformity thereto, known as the Revised Statutes of the United States. In this general act, section 57 of the act of 1869, as amended by section 3 of the act of 1873, was left out as a whole, and section 3 was added to section 52, and made section 5242 of the Revised Statutes. Section 5596 of the Revised Statutes repealed all parts of acts not contained in said revision, and made the sections of the revision applicable thereto, to stand in the place of such repealed provisions. In 1875 an act was passed (18 Stat. at L. 300) correcting errors in the Revised Statutes, by which act section 57 of the act of 1864, left out in the previous consolidation, was restored and made a part of section 5198, which is now as follows: "That suits, actions and proceedings against any association under this title may be had in any Circuit, District or Territorial court of the United States held within the district within which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

Thus it will be seen that when this action began, section 5198 above, and the proviso to section 57 of the act of 1864, inhibiting attachment before judgment, were of force, the substance of which, for a proper understanding of the question involved, will now be repeated. Section 5198 provides that these associations may be sued in any Circuit, District or Territorial court of the United States held within the district where the association is established, or in

any State, county or municipal court in the county or city where it may be located, having jurisdiction in similar cases. And section 5242, which is the section rendering transfers of notes * * in contemplation of insolvency * * * void by proviso attached thereto, inhibits attachments against these associations before judgment.

Now the question is, whether, with these two provisions of force this suit can be maintained in a State court not in the State where the bank is located. This will depend upon the construction which must be given to these two provisions. And, first was it the intent of section 5198 to confer exclusive jurisdiction upon the courts therein named? and secondly, does the proviso to section 5242 apply to all suits, or only to such suits as might arise in consequence of the attempted transfers of notes * * * made in contemplation of insolvency, which are inhibited in that section, and to which section this proviso is attached?

The eighth section of the act declares that every banking association formed and organized in pursuance thereof shall be a body corporate, possessed with the usual powers of corporations, to-wit, to make contracts, to sue and be sued in any court of law and equity, as a natural person. If the act had stopped at this section, the question presented here could hardly have arisen, as doubtless the jurisdiction of the State courts would have been universally conceded when the action was properly brought in accordance with State laws. Did the subsequent section of the original act, section 57, now section 5198 of the Revised Statutes, conflict with section 8? It certainly did not in express terms. It is true that jurisdiction is conferred on the courts therein named, but not in language which expressly makes that jurisdiction exclusive. The language employed is, that suits, actions and proceedings against such associations *may* be had in said courts. The word "may" is a permissive word, not mandatory and not necessarily exclusive.

There being no express negation, then, of jurisdiction to the State courts generally, the next question is, has jurisdiction been taken away by implication? It has been held in some courts that the jurisdiction of a State court cannot be taken away by implication. *Teall v. Felton*, 1 N. Y. 537; s. c., 2 Hill, 264; 26 Wend. 192. The subject-matter involved in this action is an ordinary common-law matter — breach of contract. The Circuit Court certainly had jurisdiction of this. The defendant is an artificial be-

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ing, invested with the rights and privileges, and subject to the liabilities of a natural person, and ordinarily should stand before the courts as to jurisdiction over its person as other individuals occupying the same position. Our laws have made provision for making such beings parties to actions under certain conditions where their rights are involved, or their obligations are to be enforced, and in the absence of all express exclusion of jurisdiction by the acts of Congress creating them, the implication should be very strong to divest the State courts of their usual functions in such cases. It should be a necessary implication.

The argument is, that the enumeration of certain courts in the act was wholly useless, unless a restriction was intended ; that these courts would have had jurisdiction without this special grant in common with other courts, and therefore the only purpose of conferring it expressly must have been to confer it exclusively. This argument has much force, but it is not conclusive. The implication arising from it does not appear to be of that strong controlling character sufficient to paralyze the arm of the State courts, and to render these associations free from State control, enabling them to delay and defraud creditors, and as was said by CHURCH, C. J., "involving an amount of expense and injustice which we cannot attribute to the intention of the law-making power."

The decisions in other States are not uniform on this question. The two most prominent cases in which the question has been discussed are the cases of *Crocker v. Marine National Bank*, 101 Mass. 240 ; s. c., 3 Am. Rep. 336 ; and the case of *Cook v. State National Bank*, 52 N. Y. 97 ; s. c., 11 Am. Rep. 667. These cases reached directly opposite conclusions ; GRAY, J., in Massachusetts, holding, that by force of the act of Congress, such associations could be sued only in the county or city where the association was established, and CHURCH, C. J., in New York, that an intent to take away jurisdiction from the State courts should not be deduced from the doubtful and ambiguous language employed in the act of Congress. The question has never been made squarely in the Supreme Court of the United States. The nearest approach to it was in the case of *Casey v. Adams*, 12 Otto, 66, but the decision there is not strictly in point, and the respondent's counsel admits frankly, that the decisions in the other States are in conflict.

In the absence of any case in our own courts, of direct decisions in the Supreme Court of the United States, and in the conflict be-

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tween the cases in the courts of the States, the respondent, falling back upon general principles, takes the position that these associations are financial agents of the government, established by act of Congress for that purpose; that as such, they are exempt from all control of the State authorities, except so far as may be permitted by Congress. He refers to *Van Allen v. Assessors*, 3 Wall. 589, in which CHASE, C. J., the author of the system, discussed fully the character of these banks and the purpose of their creation.

No doubt they were intended as financial agents of the government, and being created by act of Congress, they should be entirely free from the legislation of the States; that is, the States could not add to or diminish their powers and duties by adverse legislation or cripple them in any way in the exercise of their legitimate functions; but it does not follow that they are to be regarded as wholly exempt in every respect from responsibility to State laws. This would be giving them a much higher position than any other citizen of the United States. This is not necessary to their usefulness or value as financial agents of the government, and they are not entitled to that position. They have power to contract in the several States, to sue in the State courts, and there can be no reason why they should not be exempt from State process when they breach their contracts. There should be reciprocity. In our opinion, the demurrer upon the first ground should have been overruled.

The proviso to section 5242 prohibiting attachment proceedings against these associations before judgment rendered, we think, applies to the suits arising out of the matters referred to in that section. The purpose of this proviso being to prevent discrimination between creditors in cases of insolvency or bankruptcy, and this not being a case arising under that section, there was no foundation for the demurrer on that ground. *Robinson v. National Bank*, 81 N. Y. 392; s. c., 37 Am. Rep. 508. The question of the power of Congress to strip the State courts of jurisdiction in such cases, involving, as in this case, simply a common-law cause of action, is not necessarily involved, and therefore we have not considered it.

It is the judgment of this court that the judgment of the Circuit Court be reversed and the case be remanded for a new trial.

Judgment reversed.

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EX PARTE BENSON.

(18 S. C. 33.)

Carrier — common — rates of charges.

A common carrier is not bound to transport goods at the same rates of charges for all. (*See note, p. 568.*)

THE opinion states the case. The petition was dismissed below.

J. S. Muller and J. T. Sloan, for appellants.

James Conner, contra.

SIMPSON, C. J. The appellants, Benson & Co., filed a petition in the court below *in re* the above stated causes, praying payment of a certain claim for \$668 as rebate freight on six hundred and sixty-eight bales of cotton shipped over the Greenville and Columbia railroad by the petitioners, from Anderson Court House, during the cotton season of 1877-78. This claim was founded upon an alleged contract between the petitioners and the president and directors of said railroad company acting as receivers under the order of June 18, 1872, known as Judge MELTON's order, and the petition prayed payment out of the "receivers' fund." The contract relied on by the petitioners is not denied, nor is it denied that the petitioners have fully performed their part thereof.

The contract is fully set out in the petition. In substance, it is as follows: The petitioners were engaged in buying cotton. They purchased largely in Hartwell, Georgia, and with the view to induce them to ship their cotton, bought at that place, over the Greenville railroad instead of down the Savannah river, Thomas Doda-meade, the then superintendent of the said road, proposed that if they would ship all cotton purchased during the season of 1877-78 in Hartwell, by way of Anderson, South Carolina, over said road to Charleston or Augusta, they, the said president and directors, would transport said cotton at the regular rates, the freight to be paid at the regular rates by the consignees, with the understanding however that the petitioners should have refunded to them, at the close of the season, the sum of one dollar per bale so shipped to either point above mentioned.

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This proposition was accepted by the petitioners, and a contract made accordingly, and as has been stated, was acted upon by petitioners to the extent of shipping the six hundred and sixty-eight bales mentioned above over the road during the cotton season specified. At the end of the season, the agent at Anderson Court House made out a statement of the number of bales shipped under the contract with Mr. Dodamead, the superintendent, with vouchers for the amount due, who approved the same in regular form for payment and forwarded it to the treasurer's office to be placed to the credit of Benson & Co. The claim however was not paid, because, as Mr. Dodamead says: "The funds on hand were not sufficient, every available dollar being used to pay interest on debt of road instead of being applied to current expenses."

Mr. Dodamead further testified in this connection, that such a debt as this one, to-wit, rebate on interchange of freights, should have a preference to all other debts, as they are essential to the successful competition of railroads over freights. He said that they were competing with the Savannah river transportation, and the benefit of this particular transaction to the business of the road was, that it brought cotton to the road which would not have otherwise come; besides that, the persons who hauled their cotton, also bought their supplies there, and the road got the benefit, not only of the freight in the cotton down, but also on the return supplies.

In the latter part of the year 1878, the railroad property passed out of the hands of the president and directors, heretofore receivers, into the possession of a second receiver appointed under an order of Judge PRESSLEY, made to that end, and the claim of the petitioners still remaining unpaid and refused, this petition was filed on November 2, 1881. At the December term of the court for Richland county, the master to whom the petition had been referred to take testimony touching the claim, and to report thereon to the court, submitted his report, embracing the facts herein above stated, with a recommendation that the claim be allowed, and paid out of the fund known as the "receivers' fund."

At the hearing below, Judge FRASER, upon exceptions to the master's report, dismissed the petition with costs, holding substantially, that the contract was without equity, was against public policy, could not have been for the real benefit of the company, was an unfair discrimination between shippers, and was not proper, especially when made by an appointee of the court. From this

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decree of Judge FRASER, the petitioners have appealed, and the appeal, though founded upon several exceptions, really brings up but a single question, to-wit: Are the petitioners entitled to payment out of the receivers' fund in priority to mortgage bondholders?

It is admitted that this contract was made prior to the act of 1878 (16 Stat. 784), regulating the matter of freights and charges on railroads and preventing rebates. It will be also conceded that there is nothing in the charter of this company which forbade such a contract. In the absence of statutory regulations then controlling the action of the company, it being a common carrier, we must look to the common law for the principles which are to govern in such a case.

What does the common law say as to questions like this? The leading principle of the common law, as applicable to common carriers, is that they are bound to carry for all, and for a reasonable remuneration from each. In *Johnson v. Pensacola & Perdido Railroad Co.*, 16 Fla. 623; s. c., 26 Am. Rep. 731, Mr. Justice WESTCOTT, in discussing a similar question to the one involved here, has collected many authorities bearing upon this point, and the conclusion which he reaches is: "That as against a common or public carrier, every person has the same right; that in all cases where his common duty controls, he cannot refuse A. and accommodate B.; that all the entire public have the right to the same carriage for a reasonable price at a reasonable charge for the service performed, and the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is, that for services performed, he shall charge no more than a reasonable sum to him."

This conclusion is sustained by numerous authorities, both English and American. *Peek v. North Staffordshire Railroad Company*, 10 H. L. 511; *Bastard v. Bastard*, 2 Show. 82; *Harris v. Packard*, 3 Taunt. 264; *Citizens' Bank v. Nantucket Steamboat Company*, 2 Story, 35; 4 Otto, 155; 1 Chitty Cont. 684. In *Fitchburg Railroad Company v. Gage*, 12 Gray, 393, the Supreme Court of Massachusetts held that a "railroad corporation is not obliged, as a common carrier, to transport goods and merchandise for all persons at the same rate," the common-law rule being that equal justice shall be done to all parties. "But the equality which is to be observed in relation to the public and to every individual consists

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in the restricted right to charge in each particular case of service a reasonable compensation and no more." If the carrier confines himself to this, no wrong can be done and no cause afforded for complaint.

In the eighth edition of Story Bailm., § 508, it is stated that "at common law a common carrier of goods is not under obligation to treat all customers equally. He is bound to accept and carry for all, upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable, nothing more. There is nothing in the common law to hinder a common carrier from carrying for favored individuals at an unreasonably low rate, or even for gratis."

As extracted from these authorities, and many others which might be cited, the extent of the common-law rule seems to be, not that carriers shall transport for all parties at the same rate of compensation, otherwise their contracts are illegal and void, but that they shall transport at reasonable rates to all. A difference in charge does not *per se* invalidate the contract as inequitable and against public policy; but to have this effect, there must be an element of unreasonableness in the charge itself, as applied to the services rendered, between the parties to the contract and without comparison to the charges against others.

Independent of statutes and provisions in their charters restricting corporations within certain limits, they stand in the community as other individuals invested with the power to contract and be contracted with, and the validity of their contracts depends upon the same principles which govern in contracts between natural persons. It is too vague to say, in general terms, that the contract is inequitable and against public policy, and therefore not enforceable. To be void on such grounds, it must run counter to some known principle of equity or contravene some well-established doctrine of public policy forbidding it.

We do not know that this contract was obnoxious to any of these objections; nor in the face of the testimony of the experienced superintendent who gave it, can we say that it was unnecessary. The cotton which he brought to the head of his road at Anderson Court House, was grown in the State of Georgia, at a distance from Anderson. The Savannah river, running between Anderson and Hartwell, was its natural outlet to market, and, no doubt, afforded

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cheaper transportation. With these obstacles in the way, it required some inducement to be held out so as to bring this cotton to the Greenville road. And so long as the charges against others were not unreasonable, and in no way increased by the rebate offered to it, what ground is there for the courts to interfere? It is the province of the court to enforce contracts, not to destroy them.

[Omitting other points.]

Judgment reversed.

NOTE BY THE REPORTER. — In *Houston, etc., Ry. Co. v. Rust*, 58 Tex. 33, the court said: "The leading American decisions which have in recent times passed upon the obligations of railway companies toward the public in their relation of common carriers have been uniform, we think, in maintaining, on principles of the common law, irrespective of statutes, that their duty lies in the strictest impartiality in the conduct of their business, and in withholding all privileges or preferences for one customer which are not extended to all. See *Hutchinson on Carriers*, §§ 297-301, inclusive, and the cases there cited and discussed, and other authorities cited.

"Pierce, in his treatise on the Law of Railroads, 498, deduces from the cases decided the following propositions: 'A railroad company being under a public obligation as a common carrier, and being in a certain sense a public agent in consequence of holding by delegation the power of eminent domain, is required to treat the public with equality and fairness. It cannot discriminate in the transportation of persons and merchandise, by giving special privileges to one which it denies to another (citing *Sandford v. Catwells*, W. & E. R. Co., 24 Penn. St. 378; *Audenried v. Phil. & R. R. Co.*, 68 Id. 370; a. c., 8 Am. Rep. 195; *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188; a. c., 8 Am. Rep. 31; *McDuffee v. Portland & R. R. Co.*, 53 N. H. 430; a. c., 13 Am. Rep. 73; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365; a. c., 8 Am. Rep. 690), or by charging for the same service higher rates to some than to others. Citing *Messenger v. Penn. R. Co.*, 7 Vroom, 407; a. c., 13 Am. Rep. 457; *Cumberland Valley R. Co.'s Appeal*, 62 Penn. St. 218, 230; *Cambles v. Phil. & R. R. Co.*, 4 Brewster, 563, 622; *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33. This rule is not to be inexorably applied so as, provided the rate is reasonable for all, to exclude contracts for transportation at a less rate in special cases, where under the circumstances the discrimination appears reasonable.' Citing *Fitchburg R. Co. v. Gage*, 12 Gray, 398; *Sargent v. Boston & L. R. Co.*, 115 Mass. 418, 423; *McDuffee v. Portland & R. R. Co.*, 53 N. H. 430, 451, 452; a. c., 13 Am. Rep. 73; *Eclipse Tugboat Co. v. Pontchartrain R. Co.*, 21 La. Ann. 1.

"Hutchinson, in his work on Carriers, § 302, in a note, shows that there is a difference of opinion upon the question whether by common law the common carrier was bound to charge the same rate for the same service to all parties; and he quotes from BYRNE, J., as follows: 'I know of no common-law reason why a carrier may not charge less than what is reasonable to one person, or even carry for him free of all charge.' The question was considered in the *Fitchburg Railroad Company v. Gage*, 12 Gray, 398. The court said: 'The principle derived from that source (the common law) is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual, consists, in the restricted right to charge, in each particular case of service, a reasonable compensation and no more. If the carrier confines himself to this, no wrong can be done and no cause afforded for complaint.' The author, in the discussion contained in the note, shows the construction which English courts have placed upon the English railway and canal traffic act of 1854, in regard to preferences in the rates charged for carrying. That act has been interpreted to apply to preferences of that character and construed not to prohibit just and reasonable discriminations in that respect. Certainly the rule of the common law is not more stringent against carriers than the act itself, which was passed in order to limit and restrict them in their dealings with the public. In this connection we will quote some of the comments of the author made

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in the note : ' Although the purpose of the act is to prevent, among other things, unreasonable discrimination in rates to the prejudice or disadvantage of particular individuals, it was not, it has been said, to relieve every person from all possible prejudice or disadvantage from any arrangement which might be made by the carrier, if the arrangement was for the benefit of the public at large, for the reasonable increase of the business and profits of the carrier, and was not entered into with a view to the advantage or preference of one party or disadvantage of the other. * * * So the courts will not interfere if the charge or arrangement will greatly promote the interest of the carrier without unreasonably prejudicing those who may desire to employ him, or will be beneficial to the community, though disadvantageous to particular individuals. * * * But though the court, when such a question is brought before it under the statute, it is said, will feel great reluctance in interfering with the carrier in the management of his own business and his interest must be taken into the account, yet if the discrimination made by him subjects others to unreasonable disadvantages, it will interfere and enjoin the carrier from making such preferences. And so it will if the object of the carrier is, not solely his own advantage, but also to give a preference to one individual to the disadvantage of another or to one locality to the prejudice of another.' The author appends to this note a reference to several English reported cases, which see.

" The rule applicable to the subject of discrimination or preferences given by railroad companies as to freight rates, as it is summarized by Mr. Pierce (quoted above), seems on reason and authority to be a just and correct statement of it, as it ought to be construed and held to apply under the principles of the common law."

To same effect, *Ragan v. Atten* (9 Lea, 606), 43 Am. Rep. 684.

STATE V. PUTMAN.

(18 S. C. 175.)

Criminal law — aiding and abetting manslaughter.

An indictment will lie for being present and aiding and abetting manslaughter.

CONVICTION of manslaughter. The opinion states the case.

W. C. Benet, for appellant.

Solicitor Orr, contra.

McGOWAN. J. This was an indictment for murder, in which Isaac Putman was charged with shooting Giles Guess, and the other defendants, Lilly Putman and Silas Putman, were present aiding and abetting therein. The indictment then concludes, "and the jurors aforesaid, upon their oaths aforesaid, do say, that the said Isaac Putman, the said Silas Putman and the said Lilly Putman, him, the said Giles Guess, in manner and form, and by the means aforesaid, feloniously, willfully and of their malice afore-

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thought, did kill and murder," etc. The jury found a verdict "guilty of manslaughter, Silas Putman and Lilly Putman recommended to the mercy of the court."

The defendants Silas Putman and Lilly Putman moved in arrest of judgment and to set aside the verdict as to them, and failing, then for a new trial upon the following ground: "Because the jury having found a verdict of manslaughter as to Isaac Putman, who did the shooting, sudden heat and passion, the elements of manslaughter, could not be attributed to Lilly and Silas. Therefore the jury erred in finding them guilty in the same degree as Isaac." The judge refused all the motions, and Silas and Lilly appealed to this court upon the ground that his honor erred in not arresting the judgment.

This was an indictment for murder against three persons, alleging that one of them did the act, and that the other two were present aiding and abetting therein. It did not charge one as principal and the others as accessories before the fact, but all as principals; as it is sometimes expressed, one in the first and the others in the second degree. There can be no doubt that with reference to the crime of murder the indictment was correctly framed and in exact accordance with established forms. *State v. Rabon*, 4 Rich. 264.

In that case three persons were indicted for murder. The indictment alleged that the fatal wound was given by Abram Rabon, the younger, and that Abram Rabon, the elder, and Duke Rabon were present aiding and abetting in the felony. All the defendants were found guilty, and in delivering the judgment of the appeal court, Judge EVANS said: "The defendants might have been charged as principals in the first degree. In Arch. C. P. 396, it is said that the pleader may charge the principal in the second degree as a principal in the first degree (for proof that he was present aiding and abetting will, in such case, maintain an indictment charging him with having actually committed the offense), or at his option, as being present aiding and abetting. The better mode however is to describe the part which each had in the crime, according to the proof of the facts as is the universal practice, and as has been done in this case. When this mode of pleading is adopted the indictment consists of three parts: 1. That Abram Rabon, the younger, feloniously, willfully and of his malice aforethought, gave the mortal wound; 2. That the other persons were feloniously

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present aiding and abetting and assisting in the commission of the murder ; and 3. The conclusion which the law draws from the parts stated, that all of them are guilty of the murder." The indictment in this case was drawn in accordance with the form here recommended, and if the defendants had all been found guilty of murder, there could have been no question about the sufficiency of the indictment to support the finding.

But conceding that the indictment is according to the most approved form in reference to the crime of murder charged, it is suggested that the jury having found that no murder was committed, only manslaughter, the condition of things is entirely changed, and the indictment must be read as if it charged only the crime of manslaughter, and that with reference to that crime, which is in its nature sudden and unpremeditated, there cannot be a principal in the second degree, and therefore the allegation in the indictment as to the parties aiding and abetting should be ignored or stricken out as inappropriate, and the judgment arrested as to Silas and Lilly. This is plausible, but it seems to rest on the view that the charge of being present aiding and abetting, is equivalent to that of being accessory before the fact.

It is conceded that there can be no accessories before the fact in manslaughter, but the authorities do not sustain the view that being present, aiding and abetting, is identical with an accessory before the fact, which consists in counselling, advising or procuring the act to be done, and may be a great while before. The charge of being present, aiding and abetting, is but one of the forms of charging the parties as principals. "The distinction of principal in the first and second degree was a mere distinction in fact, and is no longer recognized." *State v. Fley*, 2 Brev. 338; 4 Am. Dec. 583; *State v. Posey*, 4 Strobb. 138, and in a note, *State v. Green*. In the case of *Fley*, Judge BREVARD said : "All persons present, aiding and abetting a murder, are regarded as principals, and equally guilty. The actual perpetrator is regarded as the agent or instrument by which the crime is perpetrated, not as the chief criminal or more guilty than his associates. It sometimes happens that he is comparatively less guilty than those who stimulate or persuade him to be their instrument. The distinction between principals in the first and second degree has been long since exploded ; it is now considered a distinction without a difference."

Upon an indictment for murder the jury may find a verdict for

manslaughter. Indeed, this is so well established that an indictment for manslaughter, as such, is rarely, if ever, given out. This being the universal practice, it would seem strange, if the view suggested is sound, that the question made here has never arisen before. The court has not been referred to any case upon the point, and in the short search which the press of business has enabled us to make we have not been able to find one. If a verdict for manslaughter can be rendered upon an indictment for murder against the perpetrator of the deed, why may not the same verdict be rendered against those who are charged as principals in aiding and abetting the crime. This must be allowable, unless the character of the crime of manslaughter is such as necessarily to exclude the possibility of participation or co-operation on the part of others present at the act.

It is true that the characteristic element of the crime of manslaughter is, that although a homicide, it is committed in sudden heat and passion and without malice aforethought. It is defined to be "the unlawful killing of a human being upon sudden heat and passion arising from reasonable provocation." But as we understand it, this does not necessarily limit the offense to the persons who actually did the deed when several were present and engaged in a common quarrel. The provocation given may extend to others as well as to the principal actor. Although the crime is said to be "sudden and unpremeditated," it need not be on the instant the provocation is received. In its regard for the weakness of human nature the law allows a certain time — reasonable time — for the transport of passion to continue before "cooling," and during that time it does not seem to us impossible for others present, affected by the same provocation and passion, to stimulate and incite the principal actor to the perpetration of the deed.

The particular facts of this case are not before us. None of the circumstances of the killing are in the brief. All we know is from the allegations of the indictment that Isaac was charged with doing the act, that Lilly and Silas aided and abetted therein, and that all were found guilty of manslaughter. The jury found that Silas and Lilly co-operated with Isaac in committing the homicide, and we cannot say that such finding was so impossible or unauthorized as to justify us in arresting the judgment as to them.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

Gunter v. Graniteville Manufacturing Company.

GUNTER V. GRANITEVILLE MANUFACTURING COMPANY.

(18 S. C. 202.)

Master and servant — negligence of general superintendent.

Where a manufacturing company employed a competent superintendent to keep the machinery in repair and good order, and another employee is injured by reason of the superintendent's negligence in that regard, the master is liable. (See note, p. 578.)

ACTION for personal injury by negligence. The opinion states the point. The plaintiff had judgment below.

D. S. Henderson and Youmans, for appellants.

W. W. Williams, O. C. Jordan and G. W. Croft, contra.

McIVER, J. [Omitting other considerations.] The next request was in these words: "That if the jury find that the company exercised ordinary skill and caution in the purchasing of the machinery, and the employment of competent and reliable persons to keep the same in order and superintend its working, then they have performed all their duty as employers to their employee, the plaintiff, and she cannot recover." This involves the proposition that the employer's duty is fully complied with when he has exercised ordinary care in furnishing suitable machinery, and in the employment of competent and careful persons to keep the same in repair, and that his duty does not require him to go further and see that all needful repairs are made. A similar proposition is involved in the exception to the charge, which was "that his honor erred in instructing the jury that 'the term co-laborer embraces all those employed in performing any portion of the work of the cotton mill, in which the plaintiff was employed, in any of its departments, but not a workman employed to keep the machinery in repair, though in some respects a fellow-servant or co-laborer,' because it is submitted that in order to constitute a 'workman employed to keep the machinery in repair,' a middleman or representative of the company, said workman must have the power to employ and discharge hands, and purchase and change machinery, and said charge being intended to apply to the position of the witness, Har-

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ling, without such qualification, was calculated to mislead the jury, and was erroneous." This request, and the exception to the charge will therefore be considered together.

Who is embraced within the terms "co-laborer" or "fellow-servant" is a question which has been the subject of no little discussion, and the authorities are somewhat conflicting. The question has been presented to different courts in various aspects, but we propose to confine our attention to the form in which it is here presented. Is a workman, employed to keep the machinery of a cotton mill in repair and in good working order, a co-laborer or fellow-servant with an operative employed to attend one or more looms as a weaver, in such a sense as to exempt the employer from liability for an injury caused by the negligence of the person employed to keep the looms in repair and proper working order? The rule seems to be well settled that the master is liable to his servant for any injury caused by his own negligence or by the negligence of any person representing him. It would seem to be clear that any person employed by the master to do any thing which it is the duty of the master to do is his representative. It undoubtedly is the duty of the master to employ the laborers who are to operate the machinery, and discharge them if incompetent or careless; and therefore any person to whom this duty is delegated by the master is undoubtedly his representative, and the master would be responsible to his servant for any injury caused by the negligence of the person to whom this duty has been delegated.

So, too, it is conceded to be the duty of the master to provide suitable machinery for the use of his operatives; and if he delegates this duty to another, he is responsible to his servant for any injury caused by the negligence of any person to whom the performance of this duty has been intrusted. It is likewise the duty of the master to keep the machinery in proper repair and safe working order; and if he intrust the performance of this duty to another, we see no reason why he should not be held liable for injury to one of his servants, caused by the negligence of the person employed to perform this duty, which it is incumbent upon the master to perform.

The test as to whether an employee is the representative of the master is, not whether such employee has the power to employ or discharge hands, or to purchase or change machinery, for while these are some of the duties of the master, they are not all

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of his duties, and hence an employee who is not intrusted with either of these powers may still be the representative of the master. The true test is whether the person in question is employed to do any of the duties of the master; if so, then he cannot be regarded as a fellow-servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master.

These views are fully supported by authority from other States, though so far as we are informed, there is no case in this State directly upon the point now under consideration. *Murray v. South Carolina Railroad Company*, 1 McM. 385, was a case in which a fireman on a locomotive was injured by the negligence of the engineer, and simply decided the general proposition that a master is not liable to one of his servants for an injury caused by the negligence of a fellow-servant, and does not purport to decide who is embraced within the term "fellow-servant." The case of *Conlin v. City Council of Charleston*, 15 Rich. 201, turned upon the question whether the person whose negligence caused the injury was a servant of the city council or of an independent contractor.

There are decisions however in our sister States. in which the question has been distinctly raised and decided in conformity with the views hereinbefore advanced, and these cases appear to be fully sustained, both by reason and authority. In *Ford v. Fitchburg Railroad Company*, 110 Mass. 240 ; s. c., 14 Am. Rep. 598, a fireman was injured by reason of a defect in the engine, which was due to the neglect of the employees of the company charged with the duty of keeping the engine in repair, although the company had no reason to suspect negligence or incompetency on the part of such employees, and it was held that the company was liable. In that case the court used the following language : " The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risk of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corpora-

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tion, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant."

Corcoran v. Holbrook, 59 N. Y. 517; s. c., 17 Am. Rep. 369, was a case in which an operative in a cotton mill was injured by the fall of an elevator, which was not kept in proper repair, and it was held that the master was liable. It is true, that in that case the injury was attributable to the negligence of the general agent, to whom the defendant had intrusted the management of the mill, but the principle upon which the decision rests shows that the liability of the master was fixed, not because the injury resulted from the negligence of a general agent, but because it was the duty of the master to supply and maintain suitable machinery, and if this duty was neglected, it did not matter to whom such duty was intrusted, the master would be liable. The court used this language: "It was the duty of the defendants toward their employees to keep the elevator in a safe condition, and to repair any injury to it which would endanger the lives or limbs of their employees, who were lawfully and properly, in the performance of their functions, in the habit of using it. That duty they delegated to their general agent. As to the acts which a master or principal is bound as such to perform toward his employees, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and held liable for the manner in which they are performed."

In *Brann v. Chicago, R. I. & P. R. R. Co.*, 53 Iowa, 595; s. c., 36 Am. Rep. 243, a brakeman on a railway train was injured by reason of the failure of an inspector to perform his duty, and the company was held liable. After laying down the proposition, that it was the duty of the corporation, not only to provide, in the first place, suitable and safe machinery and appliances, but also to see that they are kept in repair, the court said: "As the corporation must act through agents and employees, the negligence of the employees, upon whom the duty of inspection is devolved, is the negligence of the corporation," and cite a number of authorities to sustain the proposition.

In *Fuller v. Jewett*, 80 N. Y. 46; s. c., 36 Am. Rep. 575, ^{an}

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engineer on a railway was killed by the explosion of the boiler, resulting from a failure to keep it in proper repair, and it was held that the defendant was liable, although he had employed a competent superintendent of repairs and master mechanic, and made proper regulations, and the negligence was that of the mechanics directed to make the repairs. The defense was, that the negligence of the mechanics employed to make the repairs was the negligence of a fellow-servant, and therefore under the admitted rule the employee was not liable for the injury sustained by one of his other servants; but the court said, "that acts which the master, as such, is bound to perform for the safety and protection of his employees, cannot be delegated so as to exonerate the former from liability to a servant, who is injured by the omission to perform the act or duty, or by its negligent performance, whether the non-feasance or misfeasance is that of a superior officer, agent or servant [or] of a subordinate or inferior agent or servant, to whom the doing of the act or the performance of the duty has been committed. In either case in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant, whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do, by selecting competent servants or otherwise, to secure the safety of his employees." And again the court said, "the duty of maintaining machinery in repair for the protection and safety of employees is the same in kind as that of furnishing a safe and proper machine in the first instance." See, also, *Hough v. Railway Company*, 100 U. S. 213.

We are aware that there are cases, some of which have been cited by appellant, that seem to be in conflict with those above cited; but an attentive examination of those cases will show that they either ignore, or do not give full weight to what we regard as the only true test as to whether the person in question occupies the position of a fellow-servant to the servant who is injured or is a representative of the master, and that is whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master. It is well settled that it is the duty of the master to provide suitable and safe machinery and

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appliances for the use of his operatives; and we think it is also settled that his duty does not stop there, but that it is likewise his duty to keep such machinery in proper repair and safe working order, and if these duties or either of them are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have intrusted the performance of such duties to subordinates, by whatever name they may be called, and even though the master may have exercised due care in the selection of such subordinates. We think therefore that the request to charge, which we have been considering, was properly refused, and that the exception to the charge cannot be sustained.

[Omitting other matters.]

Judgment affirmed.

NOTE BY THE REPORTER.—To the same effect, *Mitchell v. Robinson*, 80 Ind. 261; a. c. 41 Am. Rep. 512. See also *Hobbs v. Seavin*, 61 Cal. 323, as to superintendent's power to contract.

In *Johnson v. Boston Tow Boat Company*, Massachusetts Supreme Court, June 1888, the action was for a personal injury sustained by an employee by the breaking of a derrick rope. The court said: "We think the court should have ruled in accordance with the defendant's prayer, that Moores and the plaintiff were fellow-servants. The evidence bearing upon the point in question was not controverted, and the material part of it was, in substance, that the defendant employed in its business twenty-four boats and an elevator, and had a general manager, who had the general control of all its business and the charge of all of its employees, boats and apparatus, and who had under him a superintendent of repairs, who visited and inspected all the lighters and apparatus used in the business. Moores was called the captain of the lighter on which the plaintiff was employed, and his duties were, as he testified, to put the men to work, to see that they did work, to keep their time and to see to everything generally; if a new fall was needed, he was to give notice to the general manager and get an order for a new one, or to get a new one himself, if it was necessary and he did not find the manager. There was a spare fall on board at the time. The manager's instructions to Moores were to replace the falls with new ones whenever there was any defect. The alleged negligence of Moores was in allowing a rope to remain in use after he knew that it was unsafe. Moores' duty was that of special superintendence. He was a foreman to superintend the labor of the men and the use and condition of the apparatus upon his boat. It is not disputed, that in superintending the labor of the men and the use of the apparatus and appliances, he was a fellow-servant with the plaintiff; but it is contended, that in his supervision of the condition of the appliances, he was acting not as a servant but as a deputy-master. The defendant was under obligations to its servants to use reasonable diligence to maintain in suitable condition the appliances furnished for their use. If the defendant exercised that diligence and provided suitable means for keeping its appliances in proper condition, and employed competent servants to see that the means were properly used, it had fulfilled its duty. It was incidental to the use of the apparatus—a part of its contemplated use—that the rope should be occasionally renewed; and when the defendant had furnished the means for that renewal and employed Moores to make the renewal whenever needed, it employed him as a servant and not as agent or deputy. When a master has furnished suitable structures, means and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means furnished, including those who use the means directly in the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by new appliances and adaptations incidental to their use, are fellow-servants in the general employment and

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business. One engaged in the care, supervision and keeping in ordinary repair of the means and appliances used in the business is engaged in the common service. [Many cases are here cited, discussed and quoted from.] The master is liable in all cases for his own negligence, and that may be shown by a defect of such a nature or so long continued as to be of itself evidence of negligence in the master, or the negligence of a servant may be of such a character that negligence of the master may be inferred from it. The instructions in the case at bar allowed the jury to find for the plaintiff without any evidence of negligence of the defendant, and solely on the ground that it was liable for the negligence of Moores. The question under consideration assumes that sufficient tackle was provided by the defendant and sufficient provision made for renewing it. Having provided sufficient appliances, a part of which received occasional renewal from the wear and tear of the use for which it was intended, and provided sufficient means for such renewal, and employed Moores to have the superintendence of the workmen and the apparatus and appliances, the use of the means provided for keeping the tackle in suitable condition was as truly a part of Moores' duty as servant, as was the use of the apparatus for the direct purposes of the business, and in performing that duty he was a fellow-servant with the plaintiff."

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(18 S. C. 380.)

Evidence — of debt — due-bill of decedent found among his papers.

A due-bill signed by a decedent and found among his private papers after his death is not alone sufficient evidence of a debt, but may be so when coupled with confidential instructions, oral and written, to his executor, to pay the same.

THE opinion states the case.,

Hayne & Ficken, for appellant.

A. G. Magrath, contra.

McIVER, J. The sole question raised by this appeal is whether the estate of the testator, Edward O'Neill, is liable to pay the survivors of Douglass, Jackson & Pickett a certain alleged debt, for at the argument here the last ground of appeal was abandoned.

The circumstances which gave rise to this claim are peculiar, and may be stated as follows: Edward O'Neill had been for many years in the employment of Douglass, Jackson & Pickett, proprietors of extensive livery stables in the city of Charleston, and had eventually become their confidential clerk and general manager.

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In 1879 his health began to fail, and being about to remove to Summerville, he made a confidential communication to his brother Dennis, the plaintiff in this case, which was testified to by Dennis at the hearing before the master, in the following words: "My brother told me, when his health was failing, and when he was about to go to Summerville, that I would find instructions in a letter, in his tin box, what to do in reference to a certain sum of money mismanaged or mislaid during the time when he was in the employment of Douglass, Jackson & Pickett."

The testator died June 27, 1879, leaving a will dated May 20, 1879, whereby he appointed his brother Dennis executor, and guardian of his child or children, and after providing for the payment of all his just debts and funeral expenses, devised and bequeathed his whole estate to his wife, for life or during widowhood with remainder to his child or children. The will was duly admitted to probate, the executor qualified and published the usual notice to creditors to present their demands, but no claim was presented by Douglass, Jackson & Pickett, for the reason, as they allege, that they did not then know of any indebtedness on the part of the testator to them. The executor having procured the key of the tin box referred to, from the testator's house, repaired to the office of the judge of probate in company with the counsel of the widow, where the tin box, which had been obtained from the safe of Douglass, Jackson & Pickett, where the testator was in the habit of keeping it, was opened and found to contain, amongst other things, the will of the testator, and a sealed envelope, addressed "Dennis O'Neill, private," upon which was the following indorsement: "Don't open this as long E. O'N. is living." The envelope, when opened, was found to contain the following letter:

"Dear Brother— Pay the amount over to Douglass, Jackson & Pickett, when Wm. Jackson pays you over five thousand dollars. Send it to them by Express, so they will not be able to find out who sent it. It will be all right as long as they get the money. This is as near as I can come to the amount. Ask them to forgive me if it is any more.

Your B., E. O'NEILL.

"May 26, 1879."

On the opposite page of the same sheet of paper upon which this letter was written, is the following:

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“ CHARLESTON, S. C., *May*, 1879.

“ Due Douglass, Jackson & Pickett, fifteen hundred dollars for value received.

“ \$1,500.

E. O'NEILL.”

The executor having instituted proceedings for the settlement of the estate of his testator, brought to the attention of the court this claim in favor of Douglass, Jackson & Pickett, to the payment of which the widow objected upon the ground that the claim was not a legal one, whereupon the survivors of Douglass, Jackson & Pickett intervened by petition and asked to have the claim paid.

There is no other evidence in support of the claim, except that above stated, and the question for us to determine is whether this evidence is sufficient to establish the claim. The mere fact that the testator signed a paper in the form of a due-bill, acknowledging himself indebted to Douglass, Jackson & Pickett in the sum of \$1,500, is certainly not of itself sufficient, for the so-called due-bill was never delivered. 1 Dan. Neg. Inst., § 63. But the question is whether this, taken in connection with the other evidence, may not be sufficient to establish the legality of the claim. The reason why a paper in the form of a note constitutes no evidence of indebtedness until it is delivered, is because the transaction is inchoate as long as the paper remains in the possession of the maker, and at most only furnishes evidence of an intention to give the note, which may or may not ripen into an act. Until it is delivered it is entirely under the control of the maker and may be destroyed or cancelled by him. It cannot by itself even be regarded as an admission of liability, for until it is delivered, or until the maker does some irrevocable act showing an intention to deliver, it is simply an admission to himself and amounts to no admission at all. But where a person, after signing such a paper, retains it in his possession, and does other acts or makes other declarations, showing that the retention of possession was not for the purpose of enabling him to destroy or cancel it, in case he should change his mind, but for another and different purpose, entirely consistent with the idea that the paper was regarded by him as the evidence of an absolute, binding contract, constituting a valid obligation, then it seems to us that such a paper may be regarded as furnishing evidence of a legal liability.

There cannot be a doubt, from the evidence in this case, that the

testator thought that he was indebted to Douglass, Jackson & Pickett, and that such liability grew out of the fact that while he was in the employment of that firm, he had so improperly "mis-managed or mislaid" some of their money as to make him liable for the same, and that he displayed extreme anxiety to keep this a secret, especially from his employers. This conclusively shows that his sole purpose in retaining possession of the paper in the form of a due-bill was to conceal the facts which gave rise to the indebtedness, and not for the purpose of enabling him to cancel the evidence of such indebtedness, or to recall the admission contained in the paper. His declaration to his brother before his death was an implied admission that he was liable to make good the loss resulting from his mismanagement, the particulars of which were known only to himself; and this, coupled with his written instructions to his brother as to how he wished the loss repaired, cannot be construed in any other light than as an admission of liability and a promise to pay the same, and then the written memorandum in the form of a due-bill indicated the amount for which he admitted his liability.

The whole evidence, taken together, amounts to the same thing as if he had said to his brother: "While I was in the employment of Douglass, Jackson & Pickett, I so mismanaged their funds as to make me liable to them in a sum which you will find stated in a paper in the form of a due-bill in my tin box; and this amount I wish you to pay them in such a way that they may not know from whom it comes." If he had said this, could any one doubt that the evidence would be sufficient to establish the legality of the claim?

Suppose he had said to his brother: "I owe the estate of a neighbor, who has recently died, a sum of money, which I borrowed from him shortly before his death, under circumstances that I do not wish disclosed, but gave him no note or other evidence of such indebtedness, and I wish you to pay the debt in such a way as that it may not be known from whom it comes, and you will find the amount stated in a memorandum amongst my private papers." Such a declaration, whether made orally or in writing, would not be testamentary in its character, but would be simply furnishing the evidence of an indebtedness incurred during his life-time. So here the indebtedness of the testator to Douglass, Jackson & Pickett arose during his life-time, but he did not choose to let any one have access to the evidence of such indebtedness until

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after his death, and therefore took care to let his brother, whom he had selected as his executor, know where such evidence could be obtained after his death.

We agree therefore with the Circuit judge, that the evidence adduced was sufficient to establish the claim set up by the survivors of Douglass, Jackson & Pickett.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

BENEDICT V. FLANIGAN.

(18 B. C. 506.)

Evidence — handwriting — comparison.

Comparison is competent as a means of ascertaining the genuineness of handwriting, when introduced in aid of doubtful original proof or when the evidence is conflicting, and the witnesses making the comparison need not be expert.

ACTION on a note. The signature was denied. The opinion states the point. The plaintiff had judgment below.

J. H. Rion, for appellant.

Melton, Clark & Muller, contra.

SIMPSON, C. J. The exceptions in this case, six in number, though presented in different forms, raise at last but a single question for the consideration of this court, to wit: The question of the competency of the opinion of a witness not a professional expert, as to the genuineness of a signature, derived entirely from comparison—the witness being wholly unacquainted with the hand-writing of the party.

The most direct and satisfactory proof of the genuineness of a writing is the testimony of one who was present and saw the writing executed; but this is not always possible, hence the testimony of those who are acquainted with the writing of the party in question, either from having seen him write or otherwise familiar

with his acknowledged writing, has invariably been allowed. From a knowledge thus acquired, the witness is supposed to have a standard in his mind, impressed by his memory, with which he can compare the disputed writing and thus reach a correct conclusion. This being the theory upon which such testimony has been uniformly received, it is somewhat illogical that comparison on the witness stand of a disputed signature with one acknowledged to be genuine has been as uniformly rejected by most of the courts.

The basis of the first class of testimony being nothing more than a comparison with a standard resting in memory, it would seem that the latter class would be more reliable, resting as it does upon a comparison with an acknowledged standard present and in juxtaposition with the disputed writing, especially where the comparison proposed is generally to be made by witnesses of intelligence and familiar with chirography. But nevertheless while testimony of the character first above referred to has never been questioned, yet testimony of the latter character has generally been excluded. In England, until the statute of 28 and 29 Victoria, ch. 18, § 8. the weight of authority was against such testimony. That statute however authorized a comparison by the jury and witnesses of a disputed writing with one proved to the satisfaction of the judge to be genuine, and such has been the ruling doctrine in England since. In the American States, the authorities have differed, some holding to the common-law decisions and others following the statute of Victoria.

In our State a medium line has been adopted by our court of last resort. It has been generally accepted here that comparison as an original means of ascertaining the genuineness of handwriting will not be permitted, but when introduced in aid of doubtful proof already offered it may be allowed. We have three decisions upon this subject, from which the rule as just stated may be fairly deduced. The cases of *Boman v. Plunkett*, 2 McC. 518; *Bird v. Millar*, 1 McM. 125, and *Bennett v. Mathewes*, 5 S. C. 478. In the first of these cases a comparison by jury was permitted in aid of doubtful proof. In the second it was permitted to be made by a witness, and the papers were also submitted to the jury, and Judge EVANS, in delivering the opinion of the court, said: "Admitting the principle to be correct, that such testimony is inadmissible in the first instance, yet in a case of conflicting evidence this kind of evidence was admitted in the case of *Plunkett v. Boman*,

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not as original, but as confirmatory evidence, to enable the jury to decide upon which of the witnesses they could most confide. In a practice of many years I have not known the admissibility of this kind of evidence for the purpose stated questioned."

In the last case, upon the authority of the two first, similar testimony was admitted, the comparison being made by the witnesses in the presence of the court in aid of doubtful proof, and in that case the witnesses were not professional experts, one of them being nothing more than a book-keeper in a bank, and the other a notary public. Without discussing further the authorities in other States, we may say that it has been settled with us that such testimony is competent when offered not as original evidence, but in aid of doubtful original proof, or when it is conflicting. Nor does it seem necessary that the comparison shall be made by professional experts alone; others will be permitted, the value of the comparison depending in each case upon the intelligence, skill and experience of the witness in such matters.

[Omitting minor considerations.]

As has already been stated, the rule in this State, as established and illustrated in these cases above referred to, does not seem to require that the witnesses making the comparison shall be professional experts. In *Bennett v. Mathewes*, *supra*, they have no higher qualifications in that respect than the witnesses in this case, and yet they were admitted there, and no question was raised as to that in *Bird v. Millar*. It is true such testimony, as all testimony founded upon opinion merely, is weak and uncertain, and should in every case be weighed with great caution; but the force and effect of such testimony is not before us — we are concerned only with its competency — and we think in this case that Judge WALLACE followed the leading of the three cases cited from our own books, and therefore his ruling must be sustained.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

CASES
OF THE
SUPREME COURT
OF
TEXAS.

EVANSICH V. G. C. & S. F. RAILWAY COMPANY.

(57 Tex. 126.)

Negligence — leaving turn-table unlocked — infant trespasser.

An infant of tender years, sustaining an injury while playing on a railway turn-table left unlocked and unguarded on premises of the company accessible to the public, may maintain an action therefor.*

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

F. D. Jodon, for appellant.

Hume & Shepard, for appellee.

STAYTON, A. J. This action was brought by F. G. Evansich, Sr., as next friend of his son, F. G. Evansich, Jr., a child seven years of age, to recover damages for an injury alleged to have been received by the son on the 18th day of April, 1880, on a turn-table owned by the railway company, which was alleged to be in a public place very near to a public street in the city of Brenham, unin-

* To same effect, *Nagel v. Mo. Pac. Ry. Co.* (75 Mo. 653), 43 Am. Rep. 423.

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closed, unguarded, unlocked, and easily put in motion by children. The petition set out fully the manner in which the injury was received, the character of injury received by the child, and the negligence of the railway company.

The appellee answered by a general demurrer and by special demurrers; also by general denial and by special answers. The demurrers were sustained and the cause dismissed.

As special ground of demurrer it was urged that the father, as next friend, could not maintain the action for his minor son. This action having been instituted since the adoption of the Revised Statutes, the father could institute and maintain it. *Abrahams v. Vollbaum*, 54 Tex. 227; *Brooke v. Clark*, Tex. Law Reporter, 205, affirmed at the present term of this court.

In addition to a general demurrer, there was a special demurrer, which was as follows: "The said petition is insufficient in law, because it appears from the allegations thereof, that if plaintiff has been injured or damaged, the same was caused wholly by his own contributory negligence and willful trespass upon the property of defendant."

The petition in this cause is very full, and tested by the principles set forth in many well considered cases by courts of high authority, must be considered as sufficient.

The same rule which applies to persons who from their age have discretion sufficient to protect themselves, in reference to contributory negligence, cannot be applied to infants of tender years; and in reference to them, the negligence of a party through whose want of care they receive injury will fix liability, notwithstanding the act of the infant may have been such as would defeat a recovery by an adult receiving an injury under the same circumstances.

In the case of *Railroad Company v. Stout*, 17 Wall. 660, the rule is thus stated: "It is well settled that the conduct of an infant of tender years is not to be judged by the same rules which govern that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to its maturity and capacity only, and this is to be determined in each case by the circumstances of that case." The defense urged in the case above cited was the same as in this

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case ; the facts were almost identical, and the defense was held insufficient.

In the following cases, *K. C. R'y Co. v. Fitzsimmons*, 22 Kans. 687 ; s. c., 31 Am. Rep. 203 ; *Koons v. St. Louis & Iron Mountain R.*, 65 Mo. 592 ; *Keffe v. Milwaukee & St. Paul Railway Company*, 21 Minn. 207, the facts and pleadings were substantially the same as in the present, and the plaintiffs were held entitled to recover.

The petition in this cause negatives the idea of negligence upon the part of the parents of the child injured ; shows that the turn-table was in a public place, and very near to a public street ; that children were accustomed to play on the turn-table ; that on the same day on which the injury was inflicted, and but a short time before the child was injured, another child was injured, of which the servants of the appellee had notice ; that no steps were taken to so secure the turn-table that children could not revolve it, and thereby receive injury, and that the injured child was only seven years of age, and wanting in that discretion necessary to its own protection. Such facts entitled the plaintiff to maintain the action, and if proved, to a recovery.

The question of discretion in the child, and of consequent responsibility for negligence, was not one for the court, and to be determined upon demurrer, but was for the jury.

In no class of cases can this practical experience (of juries) be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence. *Railroad Company v. Stout*, 17 Wall. 664.

A court cannot declare as a matter of law that a child of seven years is *sui juris*, and when from the age of the child there may be doubt upon that question, it should be submitted to the jury. 2 Thomp. on Neg. 1181, 1182, and citations.

The fact that the turn-table was upon the premises of the appellant does not affect the question, nor relieve it from the duty of exercising in reference thereto, such care as will render it not a dangerous machine to children who are attracted to it for amusement.

For the error of the court in sustaining the demurrer and dismiss-

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ing the cause the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

WESTERN UNION TELEGRAPH COMPANY V. NEILL.

(57 Tex. 283)

Telegraph company — negligence — damages.

A telegraph company may lawfully limit its liabilities for delays in transmitting and errors in delivering half-rate messages in the night without repetition, by express contract, or by notice in the telegraph blank used by and known to the sender, unless shown to have been occasioned by misconduct, fraud or want of due care; and in such case the receiver cannot recover more than the stipulated rate of damages where he had reason to suspect an inaccuracy, and neglected to demand repetition, relying on the receiving operator's assurance of correctness.*

ACTION of damages for negligence in transmitting telegram. The opinion states the case. The plaintiff had judgment below.

Walton, Green & Hill, for appellant.

Shocks & Sneed, for appellee.

BONNER, A. J. The controversy in this case arises from an error in the transmission of a message over the line of the appellant, the Western Union Telegraph Company, sent to the appellee, Andrew Neill, by his agent, A. J. Fry.

The message was one known as a half-rate, or night message, being sent at half the rate charged for a day message.

The printed form accompanying it, and underneath which it was written, together with the message itself, the latter being in italics, is as follows :

* See *Telegraph Co. v. Griswold*, 37 Ohio St. 301; a. c., 41 Am. Rep. 500; *Tyler v. Western Union Telegraph Co.*, 60 Ill. 431; a. c., 14 Am. Rep. 36; and notes, 1 id. 430; 9 id. 149; 11 id. 193; 24 id. 233.

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ence and reflection should settle the proper basis upon which this application should be made.

Whether or not telegraph companies should be held as common carriers, with all their common-law liabilities, has been the subject of much discussion and conflicting decisions.

In many jurisdictions, their rights, duties and liabilities have been defined by statute, and thereby much of the difficulty has been solved; but where, as in this State, there has been no such legislation, and where it is comparatively a question of first impression, we must find the proper solution in such common-law principles as are applicable, and in the decision of those courts in which, in our opinion, this application has been most appropriately and correctly made.

The great weight of authority, and which from the nature of the employment of telegraph companies seems founded upon reason, is that though in some essential particulars they partake of the character of the common carriers, they are not strictly such, and should not be held to the same degree of strict responsibility. *Scott & Jarnagan*, Law of Telegraphs, part 2, ch. 4; 2 Sedg. Dam. (7th ed.) 122, note c; 2 Redf. Railw. (4th ed.) 290; *Cooley* Torts, 646; 2 *Thomp. Neg.* 836, citing many authorities in note 3; *Ellis v. Tel. Co.*, 13 Allen, 233; *Grinnell v. Tel. Co.*, 113 Mass. 301; s. c., 18 Am. Rep. 485; *Tel. Co. v. Carew*, 15 Mich. 525; *Birney v. Tel. Co.*, 18 Md. 358; *Breese v. Tel. Co.*, 45 Barb. 274, affirmed, 48 N. Y. 132; s. c., 8 Am. Rep. 526; *Aiken v. Tel. Co.*, 5 S. C. 358.

As our legislature however has delegated to telegraph companies the power to exercise the right of eminent domain, and as their employment is *quasi* public, they should so far be governed by the law applicable to common carriers that the general duty devolves upon them to serve the public and act impartially and in good faith to all alike, and to send messages in the order received. But they are not, as is the general rule with common carriers, insurers, simply by reason of their occupation, but are held only to a reasonable degree of care and diligence in proportion to the degree of responsibility; and it follows that they have the right, in a proper manner and within a proper limitation, to restrict their liability for damages. Otherwise, as said by Lord Chief Justice JERVIS, in *MacAndrews v. Tel. Co.*, they "would become, what it is not pretended that they are, general insurers against loss arising from

casualties over which they have no control." 17 C. B., 13; *Breese v. Tel. Co.*, 48 N. Y. 132; s. c., 8 Am. Rep. 526; *Ellis v. Tel. Co.*, 13 Allen, 233; *Tel. Co. v. Gildersleeve*, 29 Md. 246; *Hibbard v. Tel. Co.*, 33 Wis. 565.

In accordance with these principles, which have been often recognized by the legislative departments also, it may now be considered as settled law, that telegraph companies can, by express contract, or by proper rules and regulations, contained in printed notices or otherwise, and brought to the knowledge of those with whom they deal under such circumstances as to create an implied contract, limit their liability for delays and errors in transmitting and delivering messages, except when caused by the misconduct, fraud or want of due care on the part of the company, its servants or agents. In cases of this character, that exemption from liability cannot be claimed for such misconduct, fraud or want of due care is a cardinal doctrine of the common law, which has become deeply rooted into our own jurisprudence, and the wisdom of which has received the sanction of ages. 2 Sedg. Dam. (7th ed.) 130; 2 Redf. Railw. (4th ed.) 290; 2 Thomp. Neg. 839, § 4; *Tel. Co. v. Carew*, 15 Mich. 525; *Ellis v. Tel. Co.*, 13 Allen, 226; *Birney v. Tel. Co.*, 18 Md. 358; *Tel. Co. v. Gildersleeve*, 29 id. 232; *Breese v. Tel. Co.*, 45 Barb. 274, affirmed, 48 N. Y. 132; s. c., 8 Am. Rep. 526; *Camp v. Tel. Co.*, 1 Metc. (Ky.) 164; *Passmore v. Tel. Co.*, 78 Penn. 238; *Aiken v. Tel. Co.*, 5 S. C. 358.

What rules and regulations are reasonable, and what are not, has given rise to many judicial decisions.

That they can so limit their liability in regard to night messages which are more subject to delays from natural and other causes that would readily suggest themselves, would seem very reasonable, and particularly when the party who avails himself of that kind of message at a reduced rate does so voluntarily in preference to what is known as a day message. We fail to perceive on principle why in such case the parties may not, as they did here, agree upon a sum certain in the nature of liquidated damages, for an error or delay arising from other cause than misconduct, fraud or the want of proper care as above shown. *Aiken v. Tel. Co.*, 5 S. C. 358.

If the testimony however should show that the failure to properly transmit or deliver a message arose from such misconduct, fraud or want of due care, then it might be very seriously ques-

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tioned, indeed, whether the same reasons of public policy which prohibit exemption from liability on these grounds, would not also prohibit a limitation upon the true amount of damages which should be recovered — telegraphic communication having now become almost a social as well as a commercial necessity, and the want of competing lines giving to the companies greatly the vantage ground over the public.

This question however is not necessary to the present appeal, and not having been fully argued by counsel, we do not make any decision upon it.

Bartlett v. Tel. Co., 62 Me. 209; s. c., 16 Am. Rep. 437, was a suit for damages caused by an error in a night message, and was based upon the reasoning in the preceding case of *True v. Tel. Co.*, 60 Me. 9; s. c., 11 Am. Rep. 156, to the effect that the company could not, on the grounds of the public policy, claim a general and unlimited exemption from any and all liability beyond the sum paid, "from whatever cause occurring," not excepting even gross negligence or the want of the lowest degree of care. That this was in effect no contract at all, as the company was not bound either to transmit the message, to transmit it correctly, or to deliver it when transmitted, and that the agreement in case of failure, to simply repay the money received, was no sufficient consideration.

That the construction placed upon the contract in the case of *True v. Tel. Co.* was a strained one, is clearly shown in a comment upon that case, in *Aiken v. Tel. Co.*, 5 S. C. 374; and in *Grisnell v. Tel. Co.*, 113 Mass. 305; s. c., 18 Am. Rep. 485, it is said by GRAY, chief justice, that the opinion of the majority of the court in *True v. Tel. Co.*, *supra*, appears to be founded on a false analogy between telegraph companies and common carriers, and is opposed in a very able dissenting opinion by Chief Justice APPELTON.

We do not admit the correctness of the principle announced in the above case of *Bartlett v. Tel. Co.*, 62 Me. 209; s. c., 16 Am. Rep. 437, that if there is expressed in the contract an invalid ground upon which exemption is claimed by the company, this taints the whole contract, and will render void other grounds therein contained which may be valid. Such has not been the rule in other courts of high standard. *MacAndrews v. Tel. Co.*, 17 C. B. 12; *Ellis v. Tel. Co.*, 13 Allen, 236; *Passmore v. Tel. Co.*, 78 Penn. 245.

It is a well-known rule of construction, that one part of a law may be unconstitutional and hence void, and another part valid, and we think the same principle would apply to a contract like the one under consideration.

The other cases of night messages which have come under our observation are generally those in which the company is sought to be held liable, not as in the case now before the court, for an alleged error in the message, but for want of due care and diligence, either in not transmitting it at all, or in not delivering it in due time, and which would come within one of the exceptions before shown as not constituting a sufficient ground of exemption. Among the cases of night messages which come within the above designations may be mentioned the following : *True v. Tel. Co.*, 60 Me. 9 ; s. c. 11 Am. Rep. 156 ; *Hibbard v. Tel. Co.*, 33 Wis. 559 ; *Candee v. Tel. Co.*, 34 id. 471 ; s. c., 17 Am. Rep. 452 ; *Tel. Co. v. Fontaine*, 58 Ga. 433, and the case cited by counsel for appellee decided by our Court of Appeals at the late Galveston Term, *Tel. Co. v. Weiting*.

We are of opinion that the company had the right to make the limitation of their liability in regard to the night message under consideration, and that it was valid and binding to the extent to protect them from damages for an error in the transmission of the message, unless shown to have been occasioned by the misconduct, fraud or want of due care of itself, its servants or agents ; and that unless thus occasioned, the measure of damages is the price agreed upon — ten times the value of the sum paid to transmit the message.

We are further of opinion that the mere fact that there may have been an error in the message as received by the operator at Austin and delivered to appellee Neill, is not of itself sufficient proof of negligence to entitle the plaintiff to recover, as the error may reasonably be referred to some other cause, embraced within the exemption clause contained in the contract. *Aiken v. Tel. Co.*, 5 S. C. 367 ; *Sweetland v. Tel. Co.*, 27 Iowa, 455 ; s. c., 1 Am. Rep. 285 ; *Tel. Co. v. Gildersleeve*, 29 Md., 248.

Another regulation of telegraph companies, held to be reasonable by the great weight of authority, is the right to demand in a proper case, as a condition of liability, that the message be repeated at a reasonable cost. 2 Sedg. Dam. (7th ed.) 130 ; 2 Redf. Rail. 290, §17, note 15 ; 2 Thomp. Neg. 841, § 6 ; *Tel. Co. v. Carew*, 15 Mich. 525 ; *Ellis v. Tel. Co.*, 13 Allen, 226 ; *Redpath v. Tel. Co.*, 112 Mass. 71 ; s. c., 17 Am. Rep. 69 ; *Grinnell v. Tel. Co.*, 113 Mass.

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299 ; s. c., 18 Am Rep. 485 ; *Wann v. Tel. Co.*, 37 Mo. 472 ; *Bress v. Tel. Co.*, 45 Barb. 274, affirmed, 48 N. Y., 132 ; s. c., 8 Am. Rep. 526 ; *Camp v. Tel. Co.*, 1 Metc. (Ky.) 164 ; *Passmore v. Tel. Co.*, 78 Penn. 238 ; *MacAndrews v. Tel. Co.*, 17 C. B. 3 ; s. c. 33 Eng. L. & Eq. 180.

The testimony of appellee Neill himself shows that upon the face of the message there was an ambiguity in the use of the word "have," which requires an explanation, and that for this purpose he went to the office to have the message repeated. That this was not done however for the reason that the operator said that it was correct as received by him.

This was before any damage had occurred, and when in all probability it might have been avoided by having the message repeated.

We are of the opinion that in an action *ex contractu* the failure to comply with such stipulation, without sufficient excuse shown, would be such non-performance of an essential condition precedent as should exonerate the company from greater liability than that agreed upon ; and further that in such case it would not be a sufficient excuse that reliance had been placed upon the subsequent declaration of the operator, that the message was correct as received by him. To permit this would be to allow the mere hearsay statement of an operator, whose business it was to send and receive messages, to subsequently vary the terms of a prior contract made by the principal, and this too not only without consideration, but by releasing the consideration agreed upon for the guaranty against error. *Tel. Co. v. Gildersleeve*, 29 Md. 248 ; *Grinnell v. Tel. Co.*, 113 Mass. 306, 307 ; s. c., 18 Am. Rep. 485 ; *Sweetland v. Tel. Co.*, 27 Iowa, 458 ; s. c., 1 Am. Rep. 285 ; *Aiken v. Tel. Co.*, 5 S. C. 377.

We are further of opinion that in an action *ex delicto*, when from the face of the message or otherwise, knowledge is brought home to the party to whom the message is sent that there is a probable error, the failure to have the message repeated, when this can be done before the damage has occurred, would be such contributory negligence as should defeat his right to recover.

Passmore v. Tel. Co., 78 Penn. 238, was like the case now under consideration, a suit for damages for an error in a message relating to the sale of land. The message as received to be transmitted was as follows : "I hold the Tibb's tract for you ; all will be right ;" as delivered by the company, "I sold the Tibb's tract for you," etc. In that case it was held that the failure to have the message re-

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peated was such contributory negligence as relieved the company from liability.

Beside it is a salutary principle of law that every one, as far as practicable, should endeavor to avert the damage which may be occasioned to him by the wrongful act of another ; that he should not suffer damages to accumulate, which by reasonable exertion, he might have avoided. 1 Sedg. Dam. (7th ed.) 164, 165 ; *Champion v. Vincent*, 20 Tex. 816 ; *Mathew v. Butler County*, 28 Iowa, 253 ; *R. Co. v. Rodgers*, 24 Ind. 103 ; *Heavilon v. Kramer*, 31 id. 241 ; *State ex rel. Rice v. Powell*, 44 Mo. 436.

Whether under this principle, appellee Neill should not have sought to lessen the damage by instituting suit against his vendee, Johnson, to cancel his deed, on the ground of mistake, and if necessary, have made the company a party to the suit, is worthy of serious consideration, but in regard to which we do not feel prepared to give an opinion.

That the notice accompanying the message in terms applied to those sent east of the Mississippi river should not in our opinion, in the present case, prevent its application to one sent west of that river. That part of the notice was evidently a mere form, and its real essential requisites were agreed to by the parties, and hence would apply to the case under consideration.

As the cause was submitted to the court without the intervention of a jury, and as the record does not disclose any special finding of law or fact by the learned judge presiding, we are not advised of the particular ground upon which his judgment was based. As however it is evident that it must have been some view of the law inconsistent with this opinion, the judgment below is reversed and the cause remanded.

Reversed and remanded.

Knittel v. Cushing.

KNITTEL V. CUSHING.

(97 Tex. 354.)

Sale — or lease of piano.

On receipt of \$75, a piano was delivered by C. to N., under a writing reciting a hiring, and promising quarterly payments of \$50 each in addition, so long as it should be kept, to return it on demand, not to remove it without C.'s consent, and to keep it insured; also stipulating that on further payment of \$350 in equal monthly installments, the piano was to become N.'s. N. sold the piano to a purchaser in good faith. *Held*, that the latter got title, the agreement not having been recorded.*

ACTION to recover a piano. The opinion states the case. The plaintiff had judgment below.

Sheppard & Garrett, for appellant.

Sayles & Bassett, for appellee.

BONNER, J. This case was submitted to the court below on the following agreed statement of facts: "It is agreed by and between the parties to this suit, that a jury may be waived, and the case submitted to the court upon the following agreed statement of facts, and that judgment shall be rendered in favor of the party in whose favor the law may be adjudged upon the hearing:

"1. Plaintiff, a merchant in Houston, Harris county, Texas, entered into a contract with Mrs. Anna A. Newhard, now Reid, in regard to a certain piano-forte, which contract is filed and is to be considered a part of this statement, as follows:

" 'HOUSTON, TEXAS, Sept. 14, 1871.

" 'Mrs. Annie Newhard this day hired and received of E. H. Cushing piano-forte No. 16,149, 7 full octave, round corner, oct. legs, made by Hallett, Davis & Co., for the use of which I promise to pay the said E. H. Cushing seventy-five dollars on receipt of the above piano-forte, and the further sum of fifty dollars for each and every quarter I shall keep the same, and the said piano-forte to be returned to him on demand, and not to be removed without his written consent, and be kept under insurance while this agreement

*See *Singer Manuf'g Co. v. Graham* (8 Oreg. 17), 34 Am. Rep. 572.

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is in force ; provided, however, if I should pay the said E. H. Cushing seventy-five dollars on the receipt of the above piano, and the further sum of three hundred and fifty dollars in seven equal payments of fifty dollars cash each month, with interest thereon at the rate of ten per cent, all of which I agree to do, then said piano-forte shall become my property.

ANNA A. NEWHARD.'

"2. Said piano-forte came into the possession of defendant, who lives in Burton, Washington county, Texas, on June 26, 1872, and is now in his possession.

"3. The piano-forte, at the time of defendant's possession, was worth \$350.

"4. The rent of said piano-forte is worth the sum of \$10 per month.

"5. Mrs. Anna A. Newhard, now Reid, brought the said piano-forte from Houston to Burton and kept the same there for about eight months in her possession with the knowledge of plaintiff.

"6. Mrs. Newhard paid on said contract, on the day of its date, \$75 ; September 15, 1871, she paid \$83.25 ; January 25, 1872, she paid \$113.87 ; July 2, 1872, she paid \$48.18.

"7. The contract between Mrs. Newhard and plaintiff was not recorded in Harris county, nor in Washington county. Defendant had no actual notice of the plaintiff's claim upon said piano-forte, and was not aware of any facts to put him upon inquiry thereof. Mrs. Newhard enjoyed a good reputation in the community for integrity and veracity.

"8. Defendant, on June 26, 1872, purchased the piano-forte from Mrs. Newhard and paid her \$350 in gold for it. She always claimed the piano-forte as her own property, and defendant bought it in good faith, and believed that it was so."

On the trial below, judgment was rendered in favor of plaintiff, E. H. Cushing, that he recover of the defendant H. Knittel the piano, and in the event that the same could not be found, that he recover as its value the sum of \$350 ; he then and there agreeing to accept the sum of \$160.32 in full satisfaction, if paid within twenty days.

The terms of the agreement above set out are so inconsistent that it cannot be held to be both a renting and a sale. It might be a matter of doubt whether it should not be held void for inconsistency and uncertainty. It is not a renting, as the first part of the agree-

ment recites it to be. If a valid instrument at all, it must be held to be a sale, and that the pretended renting was but a device to secure the remainder of the purchase money due. The price and terms of payment were agreed upon, and the possession delivered to Mrs. Newhard. The remainder of the purchase money was sought to be secured, not by a recorded lien under our statute of registration provided for this purpose, but through the pretended contract of renting. Conceding that as between the original parties, the contract would be binding, yet it would be contrary to the policy of our registration laws to hold that it would be binding also upon the defendant Knittel, who is admitted to be a purchaser in good faith, for value, and without notice.

The case of *Green v. Church* was one very much like the present in its main features, in which it is said: "The sum of \$400 for one month's rent of an instrument (piano) valued by both parties at \$550, is preposterous, and when we add to that the stipulation that the renting is to continue for eleven months unless sooner terminated by the appellees, and that the rent contracted to be paid for that time, when added to the \$400 paid in hand, makes up the sum agreed on as the price, and that Mrs. Martin had the privilege of becoming the purchaser at any time during the term upon paying the agreed rent, which was to be credited on the purchase price, there can be no room to doubt that the real transaction was intended to be a sale, and that the device of calling it a renting was resorted to in order to secure the payment of the \$150 of purchase money not paid in hand, and that at best its effect was to give to the appellees a lien as against Mrs. Martin for the unpaid purchase money. * * * The well-defined policy of the law is to have as few secret liens and claims upon personal property as possible, that the title may be readily and safely transmitted from one to another. This is in the interest of trade as well as opposed to fraud and collusion." 13 Bush, 433.

The well-known high character of the plaintiff below forbids that there was any fraudulent intention in the transaction under consideration.

The two cases differ in degree — in the amount of the first payment — rather than in principle. The case in 13 Bush, *supra*, is sustained by that of *Lucas v. Campbell*, 88 Ill. 447, and *Price v. McCallister*, 3 Grant Cases (Penn.), 248.

This seems to be contrary to a line of decisions in Missouri (*Sum-*

Green v. Raymond.

see v. Cotley, 71 Mo. 121) but we think the rule here adopted the better one on sound principles of justice and public policy. The onerous terms imposed by the contract upon the vendee, Mrs. Newhard, in the nature of a penalty or forfeiture, do not recommend it to the favorable consideration of the courts.

The judgment below is reversed and here rendered in favor of H. Knittel, that he go hence without day and recover of E. H. Cushing all costs.

Reversed and rendered.

GREEN V. RAYMOND.

(56 Tex. 80.)

Exemption — “tools and apparatus” — printer’s press, types and cases.

A printing press, types and cases are exempt from forced sale as “tools and apparatus of trade or profession.” (*See note*, p. 608.)

SUIT on bond. The opinion states the case. The defendant had judgment below.

James B. Morris, for appellants.

N. G. Shelley and R. J. Hill, for appellees.

WATTS, J. COM. APP. Appellees claim that there is a fatal and fundamental defect in the asserted cause of action such as precludes a recovery, in any event, by appellants, and vigorously insist that it shall be considered in advance of the questions presented by the appellant.

On the 11th day of March, 1871, Mrs. Lucinda Raymond qualified as the survivor in community of the community estate of herself and her deceased husband, N. C. Raymond, by giving the bond required by statute, and returning an inventory of the property of the estate. This suit is by a creditor of the estate upon that bond. A general demurrer was presented to the petition and overruled by the court.

[Omitting other points.]

N. C. Raymond, at the time of his death and for a long time prior thereto, was engaged in the publication of a newspaper in the town of Lockhart, Caldwell county, following this as his trade, and from which he derived a support for himself and family. He owned the apparatus constituting the printing office, that is, the press, type, etc. He was not a practical printer, that is, not a typesetter, but was the editor, proprietor and owner of the paper and office. Appellees claim that the press, type and other material pertaining to the office were exempt from forced sale, and did not constitute any part of the estate, and it was so held by the court below. Appellants urge this as error for which the judgment ought to be reversed.

In *Buckingham v. Billings*, 13 Mass. 82; *Danforth v. Woodward*, 10 Pick. 423; 20 Am. Dec. 531, and *Spooner v. Fletcher*, 3 Vt. 133; 21 Am. Dec. 579, it was held that a printing press, types and materials commonly used in printing offices, where several persons are employed, are not tools within the meaning of a statute exempting "the tools of any debtor necessary for his trade or occupation" and statutes of like import.

The case of *Patten v. Smith*, 4 Conn. 450; 10 Am. Dec. 166, arose under a statute exempting "necessary apparel, bedding, tools, arms or implements of his household necessary for upholding his life;" and it was there determined that a printing press, types, cases, etc., were exempt under the terms of the statute, provided the jury should find, as a matter of fact, that they were necessary for upholding the life of the debtor.

In the case of *Sallee v. Waters*, 17 Ala. 482, it was held under a statute exempting "all implements or tools of trade," that the press and type of a practical printer, which are necessarily used by him and his journeymen in the publication of a weekly newspaper, were exempt under the statute.

The case of *Prather v. Bols*, 15 La. Ann. 524, cited by counsel as sustaining the same proposition, is not accessible.

Our statute in force at the time of Raymond's death reserved from forced sale, among other things, "all tools and apparatus belonging to any trade or profession." The law then also provided that "the property reserved from forced sale by the Constitution and laws of this State, or its value if there be no such property, does not form any part of the estate of a deceased person, where a constituent of the family survives." Pasch. Dig., vol. 2, art. 5487.

The settled policy has ever been to make liberal exemptions of property from forced sale in this State. That liberality has been extended from time to time, until to-day Texas, in this particular, surpasses all the other States of the American Union. The wonderful improvement and progress of the past few years attest the wisdom of that policy, which, if continued, will in after years be demonstrated by a Commonwealth composed not only of prosperous, free and independent, but also of solvent citizens.

It has not been the policy of the judicial department to restrict this liberalizing tendency of the law-making power by a strict construction of these laws; on the contrary, they have been "liberally construed with a view to effect their objects and to promote justice."

The terms used, and especially the word "apparatus," is strikingly apt, a generic term of the most comprehensive signification.

The trade or profession of Raymond was that of editor and publisher of a weekly newspaper. What tools and apparatus belonged to that trade or profession? It is the printing press, type, cases, etc., and not alone the pair of scissors, bottle of ink and goose-quill pen of the editorial department. The apparatus belonging to the trade of a publisher must of necessity include the press, type, cases, etc., which are essential to the conducting of that business. The blacksmith could as well dispense with his anvil and hammer, the shoemaker with his awl and last, the farmer with his plow and hoe, as could the publisher dispense with his press, type and cases; and yet all of these are exempt as belonging to these respective trades. So in our opinion are the press, type, cases, etc., of the publisher exempt as belonging to his trade.

Under the facts and circumstances of this case, we conclude that the printing-press, type, cases, etc., were exempt from forced sale, and did not constitute any part of the estate of Raymond at his death.

[Omitting other matters.]

Judgment affirmed.

NOTE BY THE REPORTER.—In *Oliver v. White*, 18 S. C. 235, the court said: "The press and type cannot possibly fall under any class named, except it may be that of 'tools.' Does that word naturally and properly embrace press, type and printing materials? The word 'tool' is defined to be 'an instrument of manual operation, particularly such as are used by farmers and mechanics.' It seems to have been held, in Iowa, that it embraces printing press, type and other material, but that the contrary has been held in Massachusetts. *Buckingham v. Billings*, 13 Mass. 82; *Danforth v. Woodman*, 10 Pick. 426; 20 Am. Dec. 551. It is not perfectly clear, but we are inclined to agree with Judge WILDS, who, in delivering the judgment in the last case cited, said: 'The word 'tool' is not understood, either in its strict meaning or popular use, as designating complicated machinery,

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which in order to produce any useful effect must be worked by combining several distinct parts or separate pieces, the aid of more hands than one being necessary to perform the operation, all which is required in a printing apparatus. Nor can the several parts be denominated "tools," as they cannot be used separately, but like the axe and its handle, must be united to accomplish any work. The press and forms may, with as much propriety, be denominated 'tools' as the types. All are the necessary component parts of the machinery for printing. Besides, types cannot be used as tools of trade by a printer, after he is stripped of the other part of his printing apparatus, so that the exemption from attachment of the types alone would not enable him to pursue his trade and thereby gain his subsistence, which was the object of the statute."

See note, 26 Am. Rep. 671.

NEWCOME V. LIGHT.

(58 Tex. 141.)

Judge — disqualification — having been counsel.

A wife sued for a divorce on the ground of cruelty and was defeated. Afterward the husband sued for divorce for abandonment and succeeded. The judge who presided on the second trial was attorney for the husband on the first. *Held*, that he was incompetent as having "been counsel in the case," and the decree was not conclusive.

ACTION for partition of community property. The opinion states the case. The plaintiff had judgment and appealed.

Woods, Wilkins & Cunningham, for appellant.

Hare & Hand, for appellee

BONNER, A. J. The constitutional provision invoked in this case reads as follows: "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity within such degree as may be prescribed by law, or where he shall have been counsel in the case." Const. 1876, art. v, § 11; R. S., art. 1090.

The first suit for divorce was brought by Nancy J. Light, now deceased, against the appellee, D. W. Light, on the ground of cruel treatment. That suit was dismissed, and subsequently the second suit for divorce was brought, in which the attitude of the parties was reversed, D. W. Light being the plaintiff and Nancy J. Light

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the defendant. The second suit was based on the ground of abandonment, and resulted in a verdict and judgment for the plaintiff, D. W. Light. The honorable judge who presided on the trial of this second suit was the attorney for the husband, D. W. Light, defendant in the first suit. Ostensibly the issue in the second suit — that of voluntary abandonment on the part of the wife — was different from that in the first — cruel treatment on the part of the husband; yet if in fact the abandonment was caused by the cruel treatment of the husband, he was not entitled to a decree in his favor, as the abandonment would not, in a legal sense, have been voluntary. He defended the first suit on the ground that he was not guilty of cruel treatment, and hence that the wife was not justified in leaving him.

The present or third suit in which the same judge recused himself, was brought by the wife for a partition of the community property. This she sought also in the first suit, which was dismissed, but it was not made an issue in the second. During the pendency of this, the third suit, the wife died, and it was subsequently prosecuted by the appellant Newcome, as the executor of her estate.

It will be thus seen that the parties to all three of the suits were the same, either in their own individual rights or as privies; the object and the issues in their legal bearings and connections in the first two suits were so intimately blended as to be virtually the same; and the partition sought in the third was but a statutory result and incident of the first two. Pasch. Dig., art. 3452.

On the trial of the present suit, the court charged the jury "That the decree granting the defendant a divorce, introduced in evidence — established the fact that Nancy J. Light abandoned D. W. Light without sufficient cause. You will therefore in the consideration of the testimony, confine your inquiry to such acquisitions of property as were made by the husband and wife up to the date of such abandonment." * * *

This charge presents the question of the validity of the decree granting the divorce in the second suit; if valid, the charge was correct; if not, then no such legal result would follow as therein announced, and it would be incorrect.

Under the facts, we are of opinion that the presiding judge had "been counsel in the case" in the second suit, in contemplation of the constitutional provision above quoted.

The importance of the question involved, in view of its probable application to other cases, has caused us to hesitate in its decision, and to carefully examine and re-examine the authorities to which we have access bearing upon the subject.

These authorities are generally upon the subject of disqualification by reason of interest or relationship, the usual grounds at common law. Disqualification by reason of having been of counsel, relied on in this case, seems to be of recent origin and created by express constitutional or statutory provision. As it may exist independently of relationship or pecuniary interest in the result, it was doubtless based upon considerations of supposed bias, partiality or prejudice, arising from the relationship of client and attorney, which may reasonably be presumed might influence the action of the judge.

A brief examination of a few leading authorities upon the common-law disqualifications of relationship and interest will aid in a proper disposition of this case.

In the very interesting and instructive case of *Oakley v. Aspinwall*, 3 Comst. 547, it was decided, that where a judge was disqualified by reason of consanguinity to one of the parties, he could not sit even by consent of both, and this though the party to whom he was related was indemnified against the consequences of the suit. It was said that "the first idea in the administration of justice is, that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate, in the same cause. Mankind are so agreed in this principle, that any departure from it shocks their common sense and sentiment of justice. * * * Partiality and bias are presumed from the relationship or consanguinity of a judge to the party. This presumption is conclusive and disqualifies the judge. * * * Where no jurisdiction exists by law it cannot be conferred by consent, especially against the prohibitions of a law which was not designed merely for the protection of the party to a suit, but for the general interest of justice. It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important in that respect that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the

courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined ; but the State, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind."

In the case of *Wash. Ins. Co. v. Price*, 1 Hopkins Ch. 1, the question was, whether the chancellor, being a stockholder in the corporation, could sit in the case. It was decided that he could not. In the opinion it is said that "though the principle that a party can never act as judge is not declared by our Constitution or statutes, yet as it is a maxim of universal justice, and is undoubted law in England, it exists here as it exists there, a rule of the common law. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not ; all his powers are subject to this absolute limitation ; and when his own rights are in question, he has no authority to determine the cause. * * * A failure of justice may take place if he should not act, as it may also occur if he should decide his own cause ; but it belongs to the power which created such a court to provide another in which this judge may be a party ; and whether another tribunal is established or not, he at least is not intrusted with authority to determine his own rights or his own wrongs."

In cases of disqualification in this State, the remedy under our practice is simple — by the selection of a special judge or change of venue.

The question has been several times before the Supreme Court of Alabama. The case of *Heydensfeldt v. Towns*, 27 Ala. 423, arose upon the question of disqualification by reason of interest in the result. This case is valuable because it draws clearly the line of distinction between those judgments voidable only by reason of the common-law disabilities, and those absolutely void by reason of statutory inhibition. It is said that "the general rule unquestionably is, that it is improper and irregular for a judge to try any cause in which, under the law, he has an interest which would disqualify him as a witness. *Dimes v. Grand Junction Canal Co.*, 16 Eng. L. & Eq. 63. * * * If the judge is by statutory inhibition deprived of authority to act, then the proceedings are void (*Clanuch v. Castleberry*, 23 Ala. 85) ; but where there is no prohibition by law, the proceedings are voidable only, and are valid until avoided. *Dimes v. Canal Co.*, *supra*. Were it otherwise, the great-

est inconvenience and difficulty would ensue, since in most cases the parties acting under the proceedings would be ignorant of the want of authority until the act was done. The case we have last referred to is a clear and direct recognition of the rule, with the limitation we have expressed, and is entitled to the highest consideration, being the judgment of the House of Lords, consisting of the lord chancellor, Brougham, and Campbell, assisted by the judges, after full deliberation by eminent counsel, the case itself being one of great interest and importance."

This distinction between the common law and statutory inhibition has been recognized and acted upon in a number of cases. Mr. Freeman in his valuable work on Judgments, has collected many authorities on this general subject. As the result of these he says: "But the general effect of the statutory prohibitions in the several States is undoubtedly to change the rule of the common law so far as to render those acts of a judge, involving the exercise of judicial discretion, in a case wherein he is disqualified from acting, not voidable merely, but void." Freeman on Judgments, § 146.

This distinction has in effect been recognized by this court. In *Garrett v. Gaines*, 6 Tex. 435, the honorable judge presiding had been of counsel, and by mistake made an order dismissing the cause for want of prosecution. At a subsequent term he made another order reinstating the cause. Held that the first order was void on account of the incompetence of the judge.

In the case of *Chambers v. Hodges*, instituted January, 1851, the question of the validity of a judgment rendered at the fall term, 1842, was under consideration. That judgment was attacked on two grounds: *first*, that the presiding judge had been of counsel; *second*, that he was interested in the result. Held, that under the laws in force at the date of that judgment, there was no provision which forbade a judge of the District Court to sit in a case in which he had been counsel, though the State Constitution subsequently prohibited it. But that the statute then in force did, in express terms, make interest in the result such a disqualification as to require the judge to alternate with some other one. Laws of Republic, vol. 3, 42, § 8.

The case was decided upon the second ground, that of interest, and it was said that this rendered the judgment "a nullity, and left the case remaining undisposed of as completely as if the judge had not been present at the court."

In that case as in *Oakley v. Aspinwall*, *supra*, the disqualifying interest of the judge was sought to be removed by consent, but the reversal was placed upon the same high grounds of public policy. It was said that "the consent of parties could not remove his incapacity or restore his competency against the prohibition of the law, which was designed, not merely for the protection of the party to the suit, but for the general interest of justice." *Chambers v. Hodges*, 23 Tex. 583; *Gay v. Minott*, 3 Cush. 354. We find in Cooley's Const. Lim. (4th ed.), note 1, 517, reference to the case of *Reams v. Kearns*, 5 Cold. 217 (to which we have not access), to the effect that when the judge had previously been of counsel, the judgment was a nullity.

In *Taylor v. Williams*, 26 Tex. 583, and *Houston & T. R. Co. v. Ryan*, 44 id. 426, the judge had not been of counsel in the particular case; and in *McFaddin v. Preston*, 54 Tex. 403, he was interested in the general question only, which at common law would not be sufficient to disqualify him as a witness. 1 Greenl. Ev. (13th ed.), § 389.

Although the high character of the learned judge who presided on the trial of the second suit for divorce precludes the belief that he was intentionally biased in his judgment by reason of having been counsel for D. W. Light, yet the above decisions force us to the conclusion, that upon high grounds of public policy, he must be held so expressly disqualified as to render the judgment in that case not conclusive between these parties, and that consequently the court erred in the above charge to the jury.

This is considered by the appellant as the important question involved, and its decision may so materially change the aspect of the case as to render it unnecessary to decide the other novel questions presented.

For this error in the charge, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

Western Union Telegraph Company v. Brown.

WESTERN UNION TELEGRAPH COMPANY v. BROWN.

(58 Tex. 170.)

Telegraph company — negligence — damages.

The defendant telegraph company received from a banking house, acting as agent for plaintiff, a message to another banking house, directing the latter to protect the plaintiff's note. The sender paid the price of repeating. The message never was delivered. *Held*, (1) that the defendant was liable to the plaintiff; (2) that the damages should not be measured by the limitation provided in case of repeated messages in the blank form on which the message was written, but would embrace all actual damages, including injury to credit; (3) but not exemplary damages, in the absence of proof of express or implied authority or adoption by the company.

ACTION of damages for non-transmission of telegram. The opinion states the case. The plaintiff had judgment below.

Stemmons & Field, for appellant.

Ball & McCart, for appellee.

BONNER, A. J. On December 4, 1880, the appellee in this case, Joseph H. Brown, to meet and protect his acceptance for \$5,679.93, in favor of Dymond & Gardes of the city of New Orleans, which matured on the sixth of the same month, procured from the banking house of Tidball, Van Zandt & Co., of Fort Worth, "telegraphic exchange" on New Orleans. This he did by receiving from Tidball, Van Zandt & Co. the following message:

"FORT WORTH, TEXAS, 12-4, 1880.

"*To Louisiana National Bank, New Orleans, La.:*

"Protect Joseph H. Brown's note to Dymond & Gardes, due sixth instant.

(Signed)

"TIDBALL, VAN ZANDT & Co."

On the same day appellee Brown caused the message to be delivered to the receiving clerk of appellant, the Western Union Telegraph Company, at its office in Fort Worth; and to procure its safe and correct transmission, he caused to be paid to said clerk, not only the price demanded to send the message to New Orleans, but also that demanded to have it repeated, as required by the rules

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and regulations of the company. The clerk was aware of the importance of the message and promised to have the same promptly forwarded.

It was shown that the usual time required to send a message from Fort Worth to New Orleans was about two hours. It never in fact reached New Orleans, and in consequence the demand of Dymond & Gardes against Brown was duly protested, by reason of which Brown claims that he has been damaged, and for which this suit is brought. The only testimony bearing upon the question of the failure to receive the message in New Orleans was, that the manager and chief operator of the company at Fort Worth, some days afterwards, upon inquiry, informed the clerk of Brown that he could not trace it further than to Dallas, in the adjoining county. It does not appear when the message was sent from the office at Fort Worth, or why, as it was not repeated within a reasonable time to Fort Worth, inquiry was not made in regard to it. Further than this, there was no testimony tending to prove that the defendant company was negligent in selecting competent servants and agents in the first instance; or that knowledge of the above facts was brought home to any general officer representing the company in its corporate capacity; or that after such knowledge, it approved or adopted the negligence of the operator.

The court below in the general charge instructed the jury both upon the issues of actual and exemplary damages, and upon the latter issue refuted certain instructions asked by the company. The jury returned a verdict for plaintiff for \$4.50 actual damages and \$5,000 exemplary damages. From the judgment rendered on this verdict, this appeal is prosecuted.

There are fifteen assigned errors. Those relied on relate to the question of exemplary damages.

The delivery of the message to the agent of the company and his receipt of the same, and of the price charged for transmitting it, constituted a contract between Tidball, Van Zandt & Co., for the use of plaintiff Brown, and the defendant company. The message was one which, by the terms of this contract, was required to be repeated to the office at Fort Worth, and as it was not heard from there within a reasonable time, due diligence on the part of the operator required that it should have been inquired after, and if necessary, that it should have been repeated from that office. The failure to do this, without any excuse therefor, is such evidence of

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want of due care as would subject the company to such actual damages as the testimony may show that Brown legally sustained in consequence thereof.

In such cases, as intimated, though not decided, in *Western Union Telegraph Co v. Neill*, 57 Tex. 283 *; the measure of damages would not necessarily be confined to the stipulated damages stated in the printed conditions upon the blank forms of the company, providing for a repeated message, but would extend to the legal injury, if any, sustained by the failure to send the message, and which, in a proper case, would embrace the injury to the credit and standing of the plaintiff as a merchant.

The court, after instructing the jury as to actual damages, proceeds: "And if you further find that defendant failed to transmit and deliver said message, and that defendant, to-wit, said telegraph company, in the said failure was guilty of such gross negligence and conscious indifference to the rights of the plaintiff as show a willful intention to injure the plaintiff, then in case you so conclude and find, it will be your duty not only to return a verdict for the amount of actual damages, if any, sustained by him, but you will, in addition thereto, allow the plaintiff such punitive or exemplary damages as may to you seem right and proper, under all the facts and circumstances in evidence before you, not to exceed \$10,000."

Among other special charges, the following was asked by the company and refused: "You are further instructed that there was no evidence of malice, ill-feeling or intentional wrong done by defendant to plaintiff; the measure of damages in this case is the actual damages sustained by plaintiff; that is, the amount of actual loss in money sustained by plaintiff, directly traceable to the wrong done him by defendant."

It is now the settled law of this State, that to make a corporation liable for exemplary damages, the "fraud, malice, gross negligence or oppression" which must authorize and justify the same, must have been committed by the corporation itself, or some superior officer representing it in its corporate capacity; or if committed by a subordinate servant or agent, the act must have been either previously authorized, or subsequently ratified or approved by the company or such superior officer after knowledge of the facts. In other words, the same rules in regard to such damages, which apply to private individuals or firms and their servants or agents in the

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relation of master and servant or principal and agent, apply also to corporations. *Hays v. R. Co.*, 46 Tex. 272; *Wallace v. Finberg*, 46 Tex. 37; *Willis v. McNeill*, decided at the present term.

This rule is sustained by the great weight of authority, and no other consistent with principle and justice can be adopted. In the leading case of *Hays v. R. Co.*, it is said that corporations as well as individuals may deserve punishment. But no more than individuals are they to be punished for the malicious acts of their agents. It is obvious that no distinction can be made as to this liability whether the master be a natural or an artificial person.

In *Wallace v. Finberg*, 46 Tex. 37, ROBERTS, C. J., in speaking of the true character of damages, actual and exemplary, says that they should be "presented as separate and distinct causes of action or cross-action, with the averments respectively appropriate to each remedy, which are essentially different in the facts necessary to be averred." He further says that "if the agent who makes the affidavit (for attachment) and bond acted maliciously in doing it, he is responsible; but his malice would not be imputed by presumption to his principal, while his bad judgment in wrongfully suing out the writ would be."

This principle has been repeatedly applied both to individuals and corporations. Exemplary damages being given by way of punishment under our decisions, and being necessarily penal in their character, the motive which authorized their infliction, as said in the above case, will not be imputed by presumption to the principal when the act is committed by an agent or servant. In such case it must be shown by direct testimony on behalf of the plaintiff, or as the reasonable and probable deduction from the evidence, either that the principal authorized or ratified the act.

In *Turner v. R. Co.*, 34 Cal. 600, where the company was sought to be made liable for an act of its servant, it was said that "to render the defendant liable for punitive damages, it was incumbent on the plaintiff to show that the act complained of was done with the authority either express or implied of the defendant, or was subsequently adopted by the company."

In the case under consideration, the record fails to show either such express or implied authority, or such subsequent adoption or approval by the company of the negligence of the agent. It also fails to show by any sufficient evidence, either that the company was in the first instance, negligent in the selection of its servants,

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or that after knowledge of the facts, they ratified or approved the negligent act complained of. In our opinion the evidence did not authorize the learned judge presiding below even to submit the issue of the exemplary damages to the jury.

This dispenses with the consideration of the question whether the verdict on this branch of the case was excessive.

For the above error the judgment below is reversed and the cause remanded.

Reversed and remanded.

WOMACK V. WESTERN UNION TELEGRAPH COMPANY.

(58 Tex. 176.)

Telegraph company — limitation of liability for negligence.

The sender of a telegram is chargeable with notice of the printed conditions of the blank form on which it is written.

A limitation of liability for mistake in transmission thus provided in case of unrepeatd messages is lawful.

The mere fact that the message as delivered at its destination differs from that delivered for transmission, in a single letter, is not sufficient to warrant a larger recovery than that provided for in the limitation. (*See note, p. 630.*)

ACTION of damages for incorrect transmission of telegram. The opinion states the case. The plaintiff had judgment, and appealed.

George L. Hill, for appellant.

Turner & Stuart, for appellee.

BONNER, A. J. The appellant, John F. Womack, sued the defendant, the Western Union Telegraph Company, for damages for the failure to transmit correctly and deliver the following message:

“Blank No. 2.

“THE WESTERN UNION TELEGRAPH COMPANY.

“ALL MESSAGES TAKEN BY THIS COMPANY SUBJECT TO THE FOLLOWING TERMS:

“To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the origi-

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nating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

“Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz. : one per cent for any distance not exceeding one thousand miles, and two per cent for any greater distance. No employee of the company is authorized to vary the foregoing.

“No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company’s messengers, he acts for that purpose as the agent of the sender.

“Messages will be delivered free within the established free delivery limits of the terminal office; for delivery at a greater distance a special charge will be made to cover the cost of such delivery.

“The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message.

“A. R. BREWER, *Secretary*.

NORVIN GREEN, *President*.

“MARSHALL, TEXAS, Nov. 10, 1879.

“Send the following message subject to the above terms, which are agreed to :

“To S. M. SWENSON, SON & Co., 80 Wall street, New York :

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"If not already, close out my Decembers. Buy four hundred May deliveries. Answer.

"13, paid, \$2.39.

JOHN F. WOMACK.

" READ THE NOTICE AND AGREEMENT AT THE TOP."

The message was incorrectly transmitted in this, that the letter "d" was added to the word "close," making it closed, in consequence of which Womack alleged that he suffered damages. He paid for sending it to New York city, but failed to avail himself of the privilege to have it repeated. He testified that he did not know the contents of the printed portion of the blank form upon which the message was sent, providing for repeating it to prevent mistakes; that he had never read the same.

The message was correctly sent from Marshall to Galveston; the mistake occurred between the latter place and St. Louis, but from what cause was not shown.

Under the charge of the court the jury returned a verdict upon which judgment was rendered in favor of appellant Womack for the sum of \$2.85, the amount paid for sending the message, with interest, from which judgment this appeal is taken.

The assigned errors relate to the following propositions announced in the charge of the court:

1. That Womack must be charged with having had notice of the printed conditions upon the blank on which the message was written and to have assented to the same.

2. That the mere fact that the message received at New York city differed from that sent from Marshall was not of itself evidence of negligence, such as to entitle the plaintiff to recover, this being a charge upon the weight of evidence.

3. That the contract in regard to which the message was sent, being one pertaining to cotton futures, was illegal and void, because against public policy, and that the plaintiff was under no legal obligation to pay the loss. This charge was objected to on the ground that this issue was an immaterial one as between the parties to this suit.

I. In the case of *Western Union Tel. Co. v. Neill*, 57 Tex. 283,* some of the questions arising in this case were very carefully considered by this court in the light of numerous authorities. As the result of these authorities, it was there said that "it may now be

* *Ante*, p. 589.

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considered settled law that telegraph companies can, by express contract, or by proper rules and regulations contained in printed notices or otherwise, and brought to the knowledge of those with whom they deal, under such circumstances as to create an implied contract, limit their liability for delays and errors in transmitting and delivering messages, except when caused by the misconduct, fraud or want of due care on the part of the company, its servants or agents."

In that case it was not questioned but that the sender of the message had knowledge of the contents of the printed conditions accompanying it. In this, as before stated, Womack testified that he did not know their contents, and that he had never read them. Upon this issue, the question arises whether his failure to read these conditions excuses him from being held as charged with knowledge of their contents.

The sound and practical rule of law in such cases is, that in the absence of fraud or imposition, a party to a contract, which has been voluntarily signed and executed by him, with full opportunity for information as to its contents, cannot avoid it on the ground of his own negligence or omission to read it.

The precise question was made and decided in *Grinnell v. Tel. Co.*, 113 Mass. 301, 307; s. c., 18 Am. Rep. 485; the regulations in that case having been printed in very small type, and not having been read or made known to the plaintiff. Chief Justice GRAY, in delivering the opinion of the court, says that the plaintiff's omission to read the printed form cannot relieve him from being bound by his signature.

In *Tel. Co. v. Carew*, 15 Mich. 536, the message was written upon one of the printed blanks of the company, containing certain conditions, but which the plaintiff had never read; neither had his attention been called to them. The court charged the jury that the plaintiff was not bound by the conditions on the back of the dispatch, unless his attention was called to them. CHRISTIANCY, J., delivering the opinion, says: "This printed matter on the face of the paper could hardly escape the attention of any one not naturally or purposely blind, who should write a message upon the paper. He must at least know that there is some printed matter on the face of the paper, and he must be held to know that it had been placed there for some purpose connected with the message. It is therefore no excuse for him to say he did not read the printed matter before

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his eyes. It was gross negligence on his part if he did not. The printed blank, before the message was written upon it, was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions."

In support of the proposition above announced, we make the following additional citation of authorities: *Redpath v. Tel. Co.*, 112 Mass. 73; s. c., 17 Am. Rep. 69; *Grace v. Adams*, 100 Mass. 507; s. c., 1 Am. Rep. 131; *Rice v. Dwight*, 2 Cush. 87.

It is believed that a majority, if not all the cases in which a contrary doctrine has been held, are those in which the conditions were annexed to some instrument, as a bill of lading, ticket, etc., signed by the defendant only, and where the plaintiff was sought to be bound by its mere acceptance, though in the hurry of the moment he may not have known of the existence even of the conditions, and not in a case like the present, where the instrument was signed by the plaintiff himself.

II. Was the charge of the court, that the mere fact that the message as received and delivered in New York city was different from that sent, was not of itself such sufficient evidence of negligence on the part of the company as to entitle plaintiff to recover damage, one upon the weight of testimony?

It will be remembered that Womack had failed to comply with the regulation of the company, and which became a part of their contract, that to avoid mistake the message should have been repeated. That such a regulation is reasonable and proper has been frequently decided, and has been so held by this court. *Tel. Co. v. Neill*, *supra*, and the authorities there cited; to which many others could be added, including *Catchpole v. Tel. Co.*, decided by our Court of Appeals, Tyler term, 1882.

These decisions are based upon the liability of such companies to mistakes by reason of the comparative infancy and novelty of the business in which they are engaged, and of the hidden and uncontrollable causes which may prevent a correct transmission of the message. Except therefore in cases where it is shown by direct testimony, or by the facts and circumstances of the case, that the mistake or omission happened, not from such cause, but by reason of the misconduct, fraud, or want of due care on the part of the

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company, its servants or agents, it will be presumed that it occurred from some casualty sought thus to be provided against, and the stipulated compensation becomes the measure of damages. *Grinnell v. Tel. Co.*, 113 Mass. 299, s. c., 18 Am. Rep. 485; in which the cases of *Sweetland v. Tel. Co.*, 27 Iowa 455; s. c., 1 Am. Rep. 285; and *Tel. Co. v. Buchanan*, 35 Ind. 529; s. c., 9 Am. Rep. 744; are commented upon.

It has been repeatedly decided, and such is the rule adopted by this court, that the mere fact that there may have been an error in the message as received would not of itself be sufficient proof of negligence to entitle a plaintiff to recover, as the error may reasonably be attributed to some other cause. *Tel. Co. v. Neill*, *supra*, citing authorities, to which with others may be added that of *Becker v. Tel. Co.*, 11 Neb. 87; s. c., 38 Am. Rep. 356.

Under these decisions, that such testimony of itself is not sufficient to maintain a suit for damages against the company, is a question of law as to the want of testimony, to be given in charge by the court, and not one of fact as to the sufficiency of the evidence to be weighed by the jury. As a verdict for damages founded upon such testimony alone must be set aside, it would be but an idle ceremony to submit it to the jury in the first instance.

It is not intended however to lay it down as an arbitrary rule, that in no case would the mere fact of itself, that the message as delivered at the place of destination was different from that ordered to be sent, would not authorize a charge upon the question of negligence. There might be such apparent omissions or perversions in a message as thus delivered, from the one ordered, as would indicate such fraud or gross carelessness as would require that the question, as one of fact, should be submitted to the jury. But this strictness should not under the authorities be applied in a case like the present, where there was simply a mistake in one letter, and which might be consistent with a very high degree of skill and care.

The facts in this case would seem also to admit of the application of the salutary principle of law announced in case of *Tel. Co. v. Neill*, *supra*, that the plaintiff should have endeavored to have averted the damages which may have been occasioned by the mistake in the message; that he should not have suffered damages to have accumulated which he might reasonably have prevented. The testimony tends to prove, that afterward, on the very same day

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that his dispatch should have reached Swenson, Son & Co., he had notice that his December futures were not sold, and yet it does not appear that he had his message then repeated, or took other steps to prevent further loss.

Under the circumstances of the case, as shown by the testimony, we are of opinion that the plaintiff was not entitled to any larger judgment than that obtained by him, and that the first and second assigned errors were not well taken.

[Omitting *obiter dicta*.]

There being no error in the judgment below the same is affirmed.

Affirmed.

NOTE BY THE REPORTER.—In *White v. Western Union Tel. Co.*, United States Circuit Court, Kansas, the plaintiffs, who were merchants in Atchison, delivered to the agent of the defendant at that point for transmission to merchants in St. Louis, the following message: "Sell 15 July wheat; sell rye 53 or more." When the dispatch was received by the party to whom it was transmitted it read fifty instead of fifteen, and in consequence, the St. Louis merchants sold 50,000 bushels of July wheat, instead of 15,000 as instructed, and hence resulted the damage complained of. There was a limitation of liability printed on the blank form. The charge to the jury after stating these facts proceeds: "The paper upon which the dispatch is written is a form furnished by the telegraph company, limiting and restricting their responsibility in the transmission of dispatches, and this in substance forms the contract upon which this dispatch was transmitted. There are some things however sought for in this contract to relieve the defendant from liability, which the law will not admit, and that is that they cannot be released from damages by culpable negligence of the employees. If the mistake arose from the culpable negligence or gross neglect of the employees, then the company is responsible, because the law imposes upon the company some degree of care and diligence upon the part of its employees to transmit messages safely and properly. The burden of the proof rests upon the plaintiff to show that the error or mistake occurred through the gross negligence of the employee of the defendant." The jury returned a verdict for plaintiff. To the same effect is *Western Union Tel. Co. v. Blanchard*, Georgia Supreme Court, 1888; also *Plackney v. Tel. Co.*, 11 S. C. See also *Telegraph Co. v. Grinstead*, 37 Ohio St. 301; s. c., 41 Am. Rep. 508.

RELiance LUMBER COMPANY V. WESTERN UNION TELEGRAPH COMPANY.

(58 Tex. 304.)

Evidence — parol — of contents of telegram.

In an action of damages for non-delivery of a telegraphic message, parol evidence of the contents of the message is competent without notice to produce the original.*

*See *Whilden v. Merchants and Planters' Nat. Bank* (64 Ala. 1), 38 Am. Rep. 1, and note, 5.

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ACTION of damages for non-delivery of telegrams. The opinion states the point. The defendant had judgment below.

Tom J. Russell, for plaintiffs in error.

Chas. Stewart, for defendant in error.

WEST, J. This was an action for damages by plaintiffs in error against the defendant in error, based upon a failure of the defendant in error to perform its contract and agreement to deliver to the plaintiffs in error two telegraphic messages, sent to them from Galveston by one Watson, who was connected with the hardware and iron house of J. S. Brown & Co. The plaintiffs in error set up the fact of the delivery of the two messages by Watson to defendant in error, and the payment by him of the charges for transmission, their receipt of them, and their failure to transmit and deliver them.

They allege the amount of damages sustained by them growing out of the failure of defendant to comply with their contract to deliver the two messages set out in the pleadings. These are composed of two items resulting from this failure on the part of defendant. The first, the actual expense and cost which resulted to them from the failure of the defendant to transmit the two messages, this failure involving an unnecessary delay of many days, at an expense to them for hire of hands, etc., amounting to about seventeen dollars (\$17) per day. They also alleged that they then had about one hundred and twenty thousand (120,000) feet of pine logs on hand that they could have sawed at once but for the failure of defendant, and made on it, at the then price of lumber, two hundred and forty dollars (\$240), and they allege this also as an item of damage.

The defendant filed a general demurrer, and also special exceptions to the plaintiffs' petition. One of these exceptions was directed against this last allegation of damages, embracing the loss of future profits, and this was sustained by the District Court.

On the trial the plaintiffs offered the evidence of Watson, the sender of the two telegraphic dispatches set out in the pleadings, and on which the plaintiffs' action was based, for the purpose of proving, among other things, the contents of the two telegrams that were thus made the basis of the suit. To this evidence it was objected that the original telegrams were the best evidence of their

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contents, and that the plaintiffs having failed to give the defendant notice to produce them, secondary evidence of their contents was not admissible. The objection was sustained, the evidence excluded, and the jury directed to find a verdict for the defendant. The case is brought here on a writ of error, and the ruling of the court on the defendant's special exception to the petition, so far as it sought a recovery for the loss of the prospective profits to arise from the manufacture and sale of the one hundred and twenty thousand (120,000) feet of lumber that they could have manufactured from the pine logs on hand, is assigned as error. The exclusion of Watson's evidence is also assigned as error. Other errors were also assigned, which in the view we have taken of the case, need not be noticed.

The evidence offered as to the contents of the telegrams, which were set out in the pleadings, and made the basis of the plaintiffs' right to recover, was excluded by the court because it was secondary in its character, and no notice to produce the original telegrams had been given. Undoubtedly the best evidence of the contents of a written instrument consists in the actual production of the instrument itself, and the general rule is, that secondary evidence of its contents cannot be admitted until the non-production of the original has been satisfactorily accounted for. 1 Starkie Ev., marg. pp. 368, 369. Also as a general rule, notice to produce must be given to the party having the written instrument in his possession, before secondary evidence can be resorted to. There are however well recognized exceptions to this rule, and notice to produce is always dispensed with, and secondary evidence allowed, when from the very nature and character of the suit the party must know that he is charged with the possession of the instrument. 1 Starkie Ev., marg. p. 403. In such a case, the reason for giving notice and the necessity for giving it cease. In this case the suit is based on two telegrams alleged by the pleadings to have been placed in the possession of the defendant by the witness Watson; their non-delivery in accordance with their contract to deliver is made the foundation of the suit. Their whole cause of action is bottomed upon the fact that the two written instruments under consideration passed into the possession of defendant under a contract on their part to transmit the contents to plaintiffs, and that they, contrary to their contract, kept the written instruments in their possession, and in violation of their duty withheld their contents from the plaintiffs.

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In the last edition of his work on Evidence, Mr. Wharton says : " Notice to produce is not necessary in respect to a document described in the pleadings as that on which the suit is brought ; nor when from any reason connected with the form of the suit, the party is bound to know that he is charged with the possession of the document, and will be required to bring it in court."

There is no doubt that the general rule above cited as to the production of original written instruments applies to contracts by telegram. The original message is the primary evidence, and when it is not set forth fully in the pleadings, or made the foundation of the cause of action, as in this case, it must be produced or its existence and loss accounted for, before secondary evidence can be used. Whart. Ev. (2d ed.), § 76; 1 id. 1128.

We have examined the subject with the assistance of such authorities as are accessible to us, and have found but one case in which the action was based on the telegrams where the original telegrams were required to be produced. In that case (*West. Union Tel. Co. v. Hopkins*, 49 Ind. 227) the point does not seem to have been pressed in the argument by counsel, or to have been much considered by the court, nor do the authorities cited in support of the position sustain the view taken.

We are also the less inclined to follow the rule there laid down, for the further reason that our own courts appear to have adopted a different and better rule in cases where the written instrument is set out in the pleadings and made the basis of a suit.

In *Hamilton v. Rice*, 15 Tex. 385, a similar question arose as to the introduction of secondary evidence to establish the contents of certain field notes of a survey, which from the pleadings appeared to be in the possession of one of the parties to the suit. On this point Judge WHEELER remarks : " But whether it was merely notice, or whether any notice was given, is immaterial, for the reason that the case is clearly within an exception to the rule which requires notice to the party in possession of the original instrument to produce it before secondary evidence will be received to prove its contents; and no notice to produce the instrument was necessary. The answer of the defendant charged the plaintiff with the possession of the original field notes ; and he was thereby fully apprised that the defendant relied on proving their contents to make out his case. And the rule is, that where from the nature of the action, the party has notice that his adversary intends to charge him with

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the possession of an instrument, notice to produce it is unnecessary; and this is an exception to the general rule as well established as the rule itself. 1 Greenl. Ev., § 561."

In *Dean v. Border*, 15 Tex. 299, the same learned judge, in speaking of the exceptions to the rule of giving notice to produce, mentions as the third exception to the rule the following: "And thirdly, where from the nature of the action or pleadings, the party has notice that his adversary intends to charge him with the possession of the instrument."

Under the circumstances of this case, as disclosed by the pleadings, the secondary evidence offered of the contents of the telegrams should have been permitted to go to the jury.

The exception to the plaintiffs' claim for damages, based on the prospective and speculative profits likely to result to them from the sale of the boards which were to be manufactured from the one hundred and twenty thousand (120,000) feet of unsawed logs then on hand, was proper. The claim should be confined to the actual damages sustained.

The judgment is reversed and the cause remanded.

Reversed and remanded.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

JOCKERS V. BORGMAN.

(20 Kans. 102.)

Civil Damage Act — estoppel — exemplary damages.

A wife's right of recovery under the Civil Damage Act is not affected by the fact that she had signed the defendant's petition for a dramshop license. In an action under the Civil Damage Act exemplary damages may be awarded although the defendant is also liable to criminal punishment.

ACTION under Civil Damage Act. The opinion states the points. The plaintiff had judgment below.

Joseph G. Lowe, Charles Brown, T. J. Humes and John Martin, for plaintiff in error.

Everest & Waggoner, J. W. Rector and Webb & Martin, for defendant in error.

HORTON, C. J. This was an action brought under the 10th section of the Dramshop Act (ch. 35, Comp. Laws 1879), in which the defendant in error (plaintiff below) recovered a judgment of \$1,000

actual damages, and \$400 exemplary damages against the plaintiff in error, for having caused the intoxication of her husband.

[Omitting minor points.]

The court below refused to give instructions fourteen and fifteen asked for by plaintiff in error. Fourteen reads :

"That a fact admitted is the same as a fact conclusively proved ; that in this case plaintiff admits that she signed voluntarily and of her own accord, divers and sundry petitions for defendant and several other persons to sell intoxicating liquors in Hanover, where she and her husband lived, and for the same time included in the pleadings and shown by the evidence in this case."

Instruction fifteen reads :

"That if the plaintiff contributed to the intoxication of her husband, either by drinking with or encouraging him to drink, or by providing means whereby he could and did obtain intoxicating liquor, in that case she cannot recover."

These instructions were properly rejected. During the time the Dramshop Act was in force, the sale of intoxicating liquors by a party having a dramshop, tavern or grocery license, was lawful, and a person signing a petition or recommendation that the party applying for such a license was a fit person to keep the same, did not thereby consent that the party obtaining the license might sell intoxicating liquors contrary to the provisions of the act, or might injure others by selling, bartering or giving intoxicating liquors without being liable for damages. The most that can be said is, that the defendant in error assisted the plaintiff in error by her signature to obtain for him a license to sell liquors under the terms of the statute. But by signing his petition, she did not authorize him to barter, sell or give intoxicants to her husband or any other person in violation of the statute, nor by so acting did she consent that he might injure her in person or property, or means of support, by intoxicating her husband. *Jackson v. Brookins, supra*. The instruction about contributing to the intoxication of her husband by drinking with or encouraging him to drink, or by providing him means whereby he could obtain intoxicating liquors, was not supported by evidence, as defendant in error was not guilty of such conduct at any time within two years prior to the commencement of this action, even if she was ever guilty. The time that plaintiff in error testified the defendant drank beer at his house which her husband bought, was, according to his testimony, about

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six years before the trial. The instruction was also erroneous, because it declared that defendant in error could not recover if she provided the means whereby he could and did obtain liquor, without saying that she provided the means, "knowing it was to be used for that purpose."

[Omitting minor considerations.]

Counsel dwell at length upon the question of exemplary damages. They contend that the doctrine of awarding such damages is wrong in principle. It is also insisted upon, that as section 6 of the Dramshop Act makes it a misdemeanor for one to sell liquors to a person in the habit of becoming intoxicated, after having received notice thereof, therefore exemplary damages cannot be allowed, because the wrong done is an offense punishable by indictment or information, and if exemplary damages be awarded a party is punished twice for the same offense. The statute expressly authorizes the recovery of damages co-extensive with the injury, and likewise exemplary damages. Therefore in sustaining exemplary damages in cases of this character, we are not engrafting upon the law. In sustaining such damages we are only executing the law as enacted. In answer to the claim that if exemplary damages are allowed, the wrong-doer is liable to be punished twice, we cite as decisive, *Wiley v. Keokuk*, 6 Kans. 94. See also *Titus v. Corkins*, 21 id. 722.

Counsel in commenting upon the decisions of this court awarding exemplary damages contend that the question should be reconsidered. Where the statute expressly authorizes the recovery of exemplary damages, the authorities are with this court. In Indiana, in an early case, the court held that where the sale was illegal, thus rendering the seller liable to a criminal prosecution, he could not be punished with vindictive damages in a civil action. *Struble v. Nodwift*, 11 Ind. 65. But it has been since held that the act of 1873 of that State has expressly abrogated this rule. *Schafer v. Smith*, 63 Ind. 226. In the latter case it was said: "While it is admitted that the general assembly of this State, in the enactment of the said twelfth section of the afore-mentioned act, intended to and did give a right of action to the person mentioned in said section, for the recovery, not only of actual damages, but also of exemplary damages, it is urged by appellant that the general assembly is prohibited by our Constitution from enacting such a law. In support of this position, appellant directs our attention to the

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fourteenth section of the first article of the Constitution of this State, which provides that 'no person shall be put in jeopardy twice for the same offense.' But we fail to see the applicability of this provision of our State Constitution to the section of the act now under consideration. We recognize the rule which ordinarily prevails, that where a given act is or may be 'the subject of a criminal prosecution, and also of a civil action for damages in favor of the party thereby injured, exemplary damages will not be allowed in such action.' This rule, however, like most of the rules of civil practice, is a proper subject of legislative action, and the general assembly may well provide in such a case as the case at bar, that the injured party may recover, not only actual damages, but also exemplary damages, and the courts of the State will be bound to carry out and enforce such provision. In considering this subject, appellant's counsel seem to confound the terms fine and exemplary damages, and to regard the one as the synonym of the other; but there is a marked and well-defined difference between the meaning of these terms. A fine is an amercement imposed upon a person for a past violation of law; but exemplary damages have reference rather to the future than the past conduct of the offender, and are not given as a compensation to the injured party but as an admonition to this offender not to repeat the offense." See also *Franklin v. Schermerhorn*, 8 Hun, 112; *Ganssly v. Perkins*, 30 Mich. 492; *Hackett v. Smelsley*, 77 Ill. 109; *Meidel v. Anthis*, 71 id. 241; *Schneider v. Hosier*, *supra*; *Brannon v. Silvernail*, 81 Ill. 434; *Corcoran v. Harran*, C. L. J., vol. 15, 29.

[Other matter omitted.]

The judgment of the District Court will therefore be affirmed.

Judgment affirmed.

All the justices concurring.

BAKER V. SCOTT.

(20 Kans. 136.)

Negotiable instrument — waiver of protest and notice.

Waiver of "protest and notice" on a note waives demand.*

*To same effect *Wolford v. Andrews* (20 Minn. 250) 43 Am. Rep. 201.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

J. W. D. Pierce, for plaintiff in error.

J. P. Campbell, for defendant in error.

HORTON, C. J. This was an action upon a promissory note, due two years after date, dated April 1, 1879, executed by one A. Saffell, to the order of Silas Baker, for the sum of \$1,000, with interest at eight per cent, payable semi-annually. The payee, plaintiff in error (defendant below), transferred the note to defendant in error (plaintiff below), with the following indorsement: "Protest and notice waived.—SILAS BAKER." Saffell afterward died and his estate was insolvent, and this action was brought to recover of the indorser. Judgment was rendered against him, and of this he complains. He contends that before he could become liable for the payment of the note, the holder thereof must have demanded payment of the maker at maturity, and that as the petition failed to allege a demand, and as the evidence fails to show a demand, no recovery can be had against him. This leads to the interpretation of the words "Protest and notice waived." All the authorities agree that the words "I waive protest," or "waiving protest," or any similar forms importing that the protest is waived, are, when applied to a foreign bill, universally regarded as expressly waiving presentment and notice. In waiving "protest" the party is considered not only as dispensing with a formality, but as dispensing with the necessity of the steps which must precede it, and of which it is merely the formal though necessary proof which the law requires. *Union Bank v. Hyde*, 6 Wheat. 572; *Edwards on Bills*, 634; 2 *Dan. Neg. Inst.*, § 1095. When however the waiver of protest is applied to an inland bill or promissory note, the authorities are not so clear as to what is intended by such an indorsement, as a protest of such instrument is not necessary in order to charge the drawer or indorser. The statute however provides:

"A notarial protest shall be evidence of a demand and refusal to pay a bond, promissory note, or bill of exchange, at the time and in the manner stated in such protest, until the contrary is shown." *Comp. Laws* 1879, ch. 14, § 18.

Sec. 6, ch. 71, *Comp. Laws* 1879, reads:

"Notaries public shall have authority * * * to demand

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acceptance or payment of foreign and inland bills of exchange and of promissory notes, and protest the same for non-acceptance or non-payment, as the case may require, and to exercise such other powers and duties as by the law of Nations and commercial usage may be performed by notaries public."

Therefore, as under the statute protest even of inland bills is recognized, such protest when made is accorded the same effect as to them as to foreign bills, although it is not necessary to make it. Therefore we are of the opinion that where protest is waived upon any bill or note, it imports that all the steps to be ordinarily taken are dispensed with; and so in waiving protest, the party dispenses with the necessity of the steps which precede it and accordingly dispenses with any demand being made. *Coddington v. Davis*, 1 Comst. 186; 3 Denio, 16; *Porter v. Kenball*, 53 Barb. 466; *Fisher v. Price*, 37 Ala. 407; *Jackard v. Anderson*, 37 Mo. 91; *Carpenter v. Reynolds*, 42 Miss. 807.

The judgment of the District Court must be affirmed.

Judgment affirmed.

All the justices concurring.

KANSAS PACIFIC RAILWAY COMPANY V. PEAHEY.

(30 Kans. 102.)

Contract — to waive statutory liability of master to servant.

A railroad company may not contract in advance with its employees for the waiver and release of the statutory liability imposed on such companies for negligence of one employee causing injury to another employee without regard to the negligence of the company. (*See note, p. 633.*)

ACTION for personal injuries by negligence. The opinion states the point. The plaintiff had judgment below.

J. P. Usher, A. L. Williams and Chas. Monroe, for plaintiff in error.

Thomas P. Fenlon and John B. Scroggs, for defendant in error.

HORTON, C. J. The petition alleges substantially that the defendant in error (plaintiff below) was employed as a brakeman and

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yardman by the railway company to work at Armstrong, in this State, and while engaged in attempting to couple two cars together, on the 23d day of August, 1879, was, without his fault, injured through the negligence of one of the engineers of defendant below, in carelessly and recklessly shoving and pushing a car against him, whereby one of his hands was caught between two cars, and greatly injured and mangled. Although the petition alleges that the engineer was incompetent, and that the company employed him without due caution, yet no evidence was offered in support of these latter allegations, and the case went to the jury solely upon the supposition that a liability had been incurred under the statute. (Laws 1874, ch. 93.) The railway company set up in its answer, among other defenses, a contract, containing a waiver and release fully covering all liabilities imposed by the statute. To this defense plaintiff filed his demurrer, alleging the contract was contrary to law, against public policy, and void. This demurrer was sustained by the court, and we are confronted at the threshold of the case with the question of the validity of this special contract. Prior to the statute of 1874, the rule of the common law prevailed in this State, that a master was not liable to his servant for an injury happening in consequence of the negligence of a fellow-servant engaged in the same general employment, unless charged with some degree of fault or negligence in the selection or retention of the fellow-servant. The legislature of the State has however changed the common-law rule, and the statute makes a railroad corporation liable for the negligence of one employee causing injury to a co-employee, without regard to the negligence of the company in selecting or retaining the employee. Whether this legislation be wise or not, it is not within our province to determine. We must assume that the legislature had satisfactory reasons for changing the rule of the common law, and having adopted the statute, as we may assume for wise and beneficial purposes, we do not think a railroad company can contract in advance for the release of the statute liability. It is a familiar principle of law that a contract made in violation of the statute is void, and also that agreements contrary to the policy of statutes are equally void. There are exceptions: thus, it is no part of the policy of the law to encourage frauds, by releasing the fraudulent party from the obligation of his contract, and so a party shall not set up his own illegality or wrong to the prejudice of an innocent person. *Bemis v. Becker*, 1 Kans. 226.

Again, he who prevents a thing being done, shall not recover damages resulting from the non-performance he has occasioned. The plaintiff below is not within these or other exceptions, and therefore the ruling of the District Court upon the demurrer must be sustained. Further, while the reasons for the rule of the common law, that the master ought not to be responsible for injuries inflicted upon one servant by the negligence of another servant in the same common employment, seem plausible and correct theoretically, yet we may assume that the legislature did not find the practical operations of the rule as affording sufficient security to persons engaged in the hazardous business of operating railroads; that for the protection of the lives and limbs of the employees of such companies, the legislature deemed it necessary to enact the statute making these companies liable for all damages done to any of their employees in consequence of the negligence of a co-employee. Now if the statute was enacted for the better protection of the life and limb of railroad employees, it would be against public policy for the courts to sanction contracts made in advance for the release of this liability, especially when we consider the unequal situation of the laborer and his employer. Take this illustration: In some States — and in our own — the owners of coal mines, which are worked by means of shafts, are required to make and construct escapement shafts in each mine, for distinct means of ingress and egress for all persons employed or permitted to work in the mines. Such a statute is for the benefit of employees engaged in working in coal mines; but the owner of such a mine would not be permitted to contract in advance with employees for operation of the mine in contravention of the provisions of the statute. The State has such an interest in the lives and limbs of its citizens, that it has the power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith. The general principle deduced from the authorities is, that an individual shall not be assisted by the law in enforcing a contract founded upon a breach or violation on his part of its principles or enactments; and this principle is applicable to legislative enactments, and is uniformly true in regard to all statutes made to carry out measures of general policy; and the rule holds equally good, if there be no express provision in the statute peremptorily declaring all contracts in violation of its provisions void, in regard to statutes intended generally to protect the

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public interests, or to vindicate public morals. Sedg. on Stat. and Const. Law (2d ed.), 337, 338. With our interpretation of the statute of 1874, and the fairly inferred intent of the legislature in enacting it, the omission therefrom of the addition in the Iowa statute, "and no contract which restricts such liability shall be legal or binding," does not empower a railroad company to evade its liability by contract.

Counsel refer to *R. Co. v. Petty*, 25 Ind. 413, permitting a land-owner to waive by contract a liability imposed by statute upon a railroad company for injuring animals unless its road is securely fenced. That decision may rest upon the well-known maxim that "He who prevents a thing being done shall not recover damages resulting from the non-performance he has occasioned." Clearly, where the owner of land through which a railroad passes has undertaken with the company to inclose the road with a lawful fence, he ought not to recover from the company damages for an injury to his stock which results wholly from his failure to perform his contract.

[Omitting other matters.]

The judgment of the District Court must be reversed, and the cause remanded.

Judgment accordingly.

NOTE BY THE REPORTER.—In *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 387, the contrary doctrine was held. FIELD, J., said: "This case is an important one, as it is of course very desirable that there should be no uncertainty with regard to the construction of the Employers' Liability Act. The plaintiff is suing, not as administratrix of her husband, but as his widow, to recover under Lord Campbell's Act pecuniary loss sustained by her through her husband's death. The Employers' Liability Act was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen. The employer was, before the passing of the act, clearly liable where he himself was guilty of negligence. It is also clear now that for the negligence of a fellow workman not coming within any of the classes of persons specified in the act the employer is not liable. But before the passing of the act *Wilson v. Merry*, L. R., 1 H. L. Sc. 383, had decided that where the injury was caused through the negligence of a superior person in the employment, the workman could recover no damages from their common employer. The object of the act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any persons belonging to the specified classes. If therefore the person injured in the present case had not made the contract which is relied on to exempt the defendant from liability, he would himself, during his life-time, clearly have been entitled to recover. It is also clear that the terms of the contract do expressly stipulate that the workmen shall not look to the defendant for compensation for any injury received in the employment, and that the deceased accepted the employment and was willing to continue working on those terms. There is no suggestion that the contract was induced by fraud or by force, or made under duress, and it was not a naked bargain made without consideration, for the defendant contributed an amount to the club equal to the whole amount of contributions from the work-

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men. I am unable to concur in the view taken by the learned County Court judge of these facts and of the statute. He held that the contract was against public policy. It is at least doubtful, whether where a contract is said to be void as against public policy, some public policy which affects all society is not meant. Here the interest of the employed only would be affected. It is said that the intention of the legislature to protect workmen against imprudent bargains will be frustrated if contracts like this one are allowed to stand. I should say that workmen as a rule were perfectly competent to make reasonable bargains for themselves. At all events, I think the present one is quite consistent with public policy. The County Court judge also held that the deceased could not contract so as to bind his widow and bar her right to sue. It is argued that although a man can bind the representatives of his estate by his contracts, the widow obtains a new and independent right by virtue of Lord Campbell's Act. There is no doubt that the subsequent act, 27 and 28 Vict. chap. 95, gives her a right to sue, independently of her character as her husband's representative. She is entitled to sue if the personal representatives do not sue within six months, but the statute only supplies a mode of procedure. The executors might take a different view from the widow and decline to bring an action, and in that case she is entitled to bring one, but she gains no new cause of action. *Read v. Great Eastern Ry. Co.*, L. R., 3 Q. B. 555, is a clear decision that Lord Campbell's Act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived." And CAVE, J., said: "I am of the same opinion. The main question is whether or not a workman can contract himself or his representatives out of the benefits of the Employers' Liability Act. The plaintiff's husband did so contract himself; it is said that the contract was against public policy. No authority has been cited in support of that proposition, and I can see no reason why such a contract should be against public policy. I should not hold it to be so, and thus interfere with freedom of contract, unless the case were clearly brought within the principle of the decisions as to the contracts which are against public policy. It was argued that whether or not the deceased could have bargained away his own right to recover damages, he could not bargain away the right of his family under Lord Campbell's Act. That act was passed because it was thought a hardship, that where a man sustained personal injuries and died without having himself recovered compensation, leaving behind him persons in certain degrees of relationship, those persons should not be entitled to bring an action. *Read v. Great Eastern Ry. Co.*, L. R., 3 Q. B. 555, has decided that the act gives no new cause of action to the relations, but only a right in substitution for the right of action which the deceased would have had if he had survived. We are bound by that decision; and the cases cited by Mr. Jelf are not in conflict with it."

STATE V. MUGLER.

(20 Kans. 233.)

Constitutional law—prohibitory liquor law—effect as to prior manufacture

A law prohibiting the brewing and selling of beer applies to beer lawfully brewed before the law took effect but sold thereafter.*

CONVICTION of violation of excise law. The opinion states the point.

* To same effect, *State v. Burgoyne* (7 Lea, 173), 40 Am. Rep. 69.

State v. Mugler.

Garver & Bond, for appellant.*H. S. Cunningham*, county attorney, for State.

VALENTINE, J. The defendant, Peter Mugler, was prosecuted criminally, in two different cases, for violations of the prohibitory liquor law. In the first case, the indictment contained but one count, charging that the defendant "did unlawfully manufacture, and aid, assist and abet in the manufacture" of certain intoxicating liquors. In the second case, the indictment contained six counts, in the first five of which it charged that the defendant, on five different days, sold intoxicating liquors in violation of law; and in the sixth count it charged that the defendant was guilty of keeping and maintaining a common nuisance, by keeping for sale and selling certain intoxicating liquors. In the first case, a motion was made by the defendant to quash the indictment, for the reason that it did not state facts sufficient to constitute any offense, and because it contained a double charge against the defendant. This motion was overruled by the court. A trial was then had in the case, before the court without a jury, upon an agreed statement of facts, which admitted that the defendant, since October 1, 1881, without a permit, manufactured beer, an intoxicating liquor, in a brewery erected by him in Salina, Kansas, in 1877, and used thereafter by him as a brewery up to May 1, 1881, the time when the present prohibitory liquor law went into effect; "that said brewery was at all times after its completion, and on May 1, 1881, worth the sum of \$10,000, for use in the manufacture of said beer, and is not worth to exceed the sum of \$2,500 for any other purpose." It was also admitted that the defendant used his brewery for the manufacture of beer after October 1, 1881, the same as he had done prior to May 1, 1881. In the second case, motions to quash the indictment and to compel the prosecution to elect upon which count it would proceed, were made by the defendant, and were overruled by the court. A trial was then had in the second case, before the court without a jury, upon an agreed statement of facts, which admitted that the sale charged in the first count of the indictment was made by the defendant, without a permit, and that it was a sale of beer manufactured by the defendant before the passage of the prohibitory act of 1881; but whether the beer thus sold was manufactured before the adoption of the constitutional amendment, in

November, 1880, prohibiting the manufacture and sale of intoxicating liquors, except for medical, scientific and mechanical purposes, the record is silent; and for what purpose the beer was sold, the record is also silent. In each of these two cases the defendant was found guilty, and fined \$100, and in each he now appeals to this court.

The principal question supposed to be involved in these two cases is as follows: Is or is not the present prohibitory liquor law constitutional, so far as it affects the defendant and his business in manufacturing beer at his brewery, and selling the same? The defendant claims that such law is unconstitutional, and his counsel make a very able and elaborate argument in this court, to show that it is unconstitutional. Among other things, they say:

"Years prior to the enactment of the law, and even before the prohibition amendment to the Constitution was discussed, the defendant erected his brewery and furnished it with the means necessary for the manufacture of beer, the subject of the charge in the indictment. When the amendment was adopted, and when the act for its enforcement became a law, the defendant's money was thus invested, and his brewery was his 'property.' The effect of the act is to close the doors of his business, and leave what had been valuable property, recognized and protected by the law, lifeless, unremunerative and almost worthless, as it idly rests under the condemnation of the new departure. By a simple legislative edict the defendant is stripped of \$7,500 in value of property, as effectually as if consumed by fire.

"In this he is deprived of property without due process of law, in violation of fundamental principles of government, and of the fourteenth article of the amendment to the Constitution of the United States, which provides: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law.'"

* * *

"The defendant is deprived of his property by mere force of the legislative decree. No rule is established or course prescribed by which his rights are in any way to be considered. The legislature finds him in the enjoyment of property, which public policy in this State has never even subjected to any police regulation, nor placed in any way under the surveillance of the law. It simply says to him: 'This business which you have built up under the protection of the law, and which to this time has not been held to infringe

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upon public rights in any way, is henceforth condemned as a nuisance, and the value of your property confiscated for the public good.' There is no notice, no hearing, no opportunity for redress; nothing is heard but this inexorable decree of annihilation, and the defendant sits in the midst of the ruins of that which years of toil had accumulated, under the vain hope that he had security under the law."

Much that counsel say we think has force. The legislature has probably gone a long way in destroying the values of such kinds of property as the defendant owned, and has possibly gone to the utmost verge of constitutional authority. And yet we do not think that the result reached by counsel for the defendant necessarily follows from the facts and circumstances of this case. The defendant is certainly not deprived of his brewery, or of his liquor, or of any of his other tangible property. So far as the constitutional amendment and the prohibition act are concerned, he still retains his brewery and his liquors, and all his other tangible property, just the same as he did prior to the passage or adoption of any of the present restrictive or prohibitory liquor laws. But probably it is not his tangible property which he claims has thus been taken or destroyed or confiscated. It is his intangible property, his vested rights, founded upon or incidental to the rightful enjoyment, or use, of his visible and tangible property, of which he claims to have been deprived. This brings us to a comparison between the former restrictive and prohibitory liquor laws of this State, and the present restrictive and prohibitory liquor laws. In 1877, when the defendant erected his brewery, he had a right to manufacture all the beer or other intoxicating liquors which he chose; and he can do so still, provided he first obtains a permit therefor from the probate judge, and he can easily obtain the permit by complying with the terms and conditions upon which permits are issued. At that time he could manufacture intoxicating liquors for any purpose which he chose; but since the adoption of the constitutional amendment, in November, 1880, he can manufacture such liquors only for medical, scientific and mechanical purposes. His right to sell intoxicating liquors, however, was always restricted. In 1877, under the then existing laws, he had no right to sell his beer or any other intoxicating liquor in any quantity or in any place in Kansas, or to any person, unless he had first obtained a license therefor. *State v. Volmer*, 6 Kans. 371; *Dolson v. Hope*, 7 id. 161; *Alexander v.*

O'Donnell, 12 id. 608. And such is still the law. The license is now called a "permit." But even with a license, the defendant had no right under the old laws, to sell his beer on Sundays or on election days, or on the Fourth of July; or to any person who was in the habit of becoming intoxicated against the known wishes of his wife, child, parent, brother, or sister; or to any minor against the consent of his parent or guardian; or at any place except the place designated in his license, which in the present case would have been in the city of Salina. Besides, the defendant had no assurance under the old laws that he could procure a license. Licenses were not granted to anybody and everybody, but only to a select few, and then the license would continue in force for the period of one year only, and no person could have any assurance that his license would be renewed. Both the issuing and the renewal of licenses depended entirely upon the temper and disposition of the community in which the application was made. Under the old laws, each community was given the privilege of determining for itself whether licenses to sell intoxicating liquors should be issued or not, and if none were issued, then the old law was as much a prohibition law as the present liquor law. The old law might properly be called not only a license law, but also an option law, and a contingent prohibition law — for licenses were allowed to be issued at the option of each community; and if they were not issued the law would become a virtual prohibition law. Under the old law the entire State might have become a complete prohibition State, at the option of its several communities, or each community might have authorized the issue of licenses, as it chose. In this respect the old law and the present law differ. The old law left the question of prohibition or license with each community separately and exclusively, while the present law theoretically enforces prohibition upon all communities, whether they are willing or unwilling. We do not here wish to be understood as saying that our present liquor law, or any liquor law which we have ever had in Kansas, is or has been an absolute and unqualified prohibitory liquor law. They have none of them been more than limited and qualified prohibition laws. Under the old law, the defendant, with a license, could sell his beer to any person and to all persons, with the exceptions heretofore mentioned; but under the present law, we suppose he is subject to at least one other restriction in his sales as to persons. He cannot now sell his beer for

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medical purposes except to druggists. It would seem however that with a permit he may now sell his beer for scientific and mechanical purposes, to any and every person who might wish to purchase the same. And therefore it would seem that in this respect no additional restrictions over the old law are imposed. We think it will now appear that the old law and the new are not so vastly different as has been by some persons supposed. Both are restrictive in their character; both are criminal laws, and both are prohibitory to some extent; and yet neither is absolutely and unqualifiedly a prohibition statute. Both restrict sales as to times, places and persons, and the present law as to purposes; and yet both laws allow sales to be made. Under the old law, the defendant never had any authority to sell his beer, except with a license. He never had any positive assurance that a license would be granted to him, or if granted, that it would be extended or renewed; and even with a license, he could not sell his beer at any other place than at the city of Salina. And his right to sell beer for any considerable period of time was always based upon many uncertainties and contingencies. Under the present law, the defendant with a permit, which he can easily obtain, can manufacture all the beer for medical, scientific and mechanical purposes which he chooses to manufacture, and can sell the same for such purposes, provided he can find purchasers therefor. The material restrictions imposed by the present law, in addition to those imposed by the old law, are simply as to the purposes for which he may sell, and as to the persons to whom he may sell for medical purposes. There are no other material or substantial restrictions.

Under such circumstances, we hardly think that the defendant had such a vested interest in the old law, or in any thing else, as would prevent the passage of a law like our present prohibition act. It would hardly seem that the defendant, by erecting a brewery in 1877, and by operating it for some time afterward, could obtain such a vested interest in any thing as to prevent further legislation with respect to intoxicating liquors, of a more restrictive and stringent character; or that he could go on, with or without legislation, and with or without a license, manufacturing and selling beer forever. We suppose that the defendant founds his right to continue to manufacture and sell beer solely and exclusively upon his supposed vested right to operate his brewery in undisturbed tranquillity forever. He certainly will not claim, that independent of his

brewery, he had a vested right at the time the constitutional amendment was adopted, or at the time the present prohibition law was enacted, to either manufacture or sell any kind of intoxicating liquor which had not yet been brought into existence. His whole claim we suppose springs from the rights which his brewery is supposed to have conferred upon him. But these rights we think cannot have such far-reaching consequences as the defendant claims. The beer which the defendant is prosecuted for manufacturing was not in existence at the time when the constitutional amendment was adopted, or at the time when the prohibition act went into operation, but it was manufactured since; and hence, independent of the defendant's interest in his brewery, he could not have had any possible vested right, at the time of the adoption and passage of the present prohibition laws, in the manufacture of such beer. Nearly the same may be said with respect to the beer which the defendant is prosecuted for selling. Presumably it was not in existence at the time when the constitutional amendment was adopted. Besides, the sale of such kinds of liquor, when made as this sale was made, would have been a violation of the laws of Kansas, and a criminal offense, at any time for the last twenty-three years. In this respect the present law is not new. The sale in the present case was made without a permit or a license. It may be that the defendant has suffered great loss on account of the passage of the prohibition act, but such loss is not the direct and immediate result of such act; it is simply the remote and consequential result of the act, and is wholly speculative and problematical. Such indirect and remote losses cannot render acts of the legislature unconstitutional. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Bartemeyer v. Iowa*, 85 U. S. (18 Wall.) 129.

It is frequently the case that the passage of statutes indirectly affects the values of property as this act does, and still we do not think that such statutes are ever declared to be unconstitutional merely for such reasons. We think that the present prohibition act of Kansas is constitutional, so far as it affects the defendant, and so far as it has any application to the two cases now under consideration. We do not think that the court below committed any error in either of these two cases; but even if it did with respect to the motions of the defendant, which it overruled, the errors were wholly immaterial. In the first case, the defendant was tried upon an agreed statement of facts simply for manufacturing intoxicating

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liquors contrary to law. In the second case, he was tried upon an agreed statement of facts, upon the first count only of the indictment, and merely for selling intoxicating liquor contrary to law, and for one sale only; and in both cases we think the judgment of the court below was correct; and it will therefore be affirmed.

Judgment affirmed.

HORTON, C. J., concurring.

BREWER, J. I concur fully in the foregoing opinion, so far as it relates to the charge of selling beer; and I think the reasoning of my brother VALENTINE thereon is unanswerable. But as to the case in which the charge is of manufacturing beer, and without regard to the purpose for which it was manufactured, while I do not care to formally dissent, I must say that my judgment is not satisfied. The defendant may have manufactured the beer for his own consumption. It certainly is not shown or alleged that he did not, and in a criminal proceeding it is not to be presumed that defendant has done wrong. And I have yet to be convinced that the legislature has the power to prescribe what a citizen shall eat or drink, or what medicines he shall take, or prevent him from growing or manufacturing that which his judgment approves for his own use as food, drink, or medicine.

Further, prior to the constitutional amendment, the manufacture of beer was free and unrestricted. No license, permit or condition was required. Under that state of the law this defendant invested his means in building and machinery suitable for the purpose of manufacturing beer, and unsuitable for any other purpose; worth \$10,000 for the former use, and not to exceed \$2,500 otherwise. The denial of the use has thus practically deprived him of \$7,500. Is not this taking private property for public use, without any compensation? If the public good requires the destruction of the value of this property, is not prior compensation indispensable?

FALLOON V. SCHILLING.

(20 Kans. 222.)

Nuisance — cheap tenement houses, when not.

The owner of land has the right to erect small, cheap and movable tenement houses thereon close to the line of an adjacent owner, and let them to orderly colored tenants, although his avowed purpose is to punish the adjacent owner for refusing to sell him his land at an inadequate price, and to compel him to do so.

ACTION for injunction. The opinion states the case. The defendant had judgment below.

James Falloon, plaintiff in error, for himself.

C. W. Johnson, for defendant in error.

BREWER, J. This was an action of injunction brought by plaintiff in error, plaintiff below, in the District Court of Brown county. On the trial of the case, after the plaintiff had finished his evidence, a demurrer thereto was sustained, and judgment entered for the defendant. The facts as stated in the petition are, that defendant was the owner of a tract of eighty acres adjoining the town of Hiawatha. Out of this tract he conveyed three-fourths of an acre to one Oscar Spalsbury, which last-named tract by sundry conveyances passed to and became the property of plaintiff. It was his homestead. His family consisted of himself, wife and two boys aged respectively six and one years. Plaintiff's dwelling-house is located within thirteen feet of the east line of his lot, and has three windows opening on that side. The town of Hiawatha has been growing rapidly for the last few years, and there is quite a demand for town lots. The eighty-acre tract, which as alleged was once wholly owned by defendant, is eligibly situated for the purposes of an addition to the town of Hiawatha, and defendant was anxious to lay off the entire eighty acres as such an addition. He offered plaintiff \$1,600 for his property, which was refused, the same being reasonably worth \$1,900 or \$2,000. Thereupon defendant conceived the oppressive and unlawful idea of rendering plaintiff's home obnoxious and unendurable to himself and family, by erecting cheap tenement houses on either side of plaintiff's

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land, and filling them with worthless negroes that they might annoy plaintiff's wife, who is a person in delicate health, and thereby punish plaintiff for refusing defendant's inadequate offer for the property. In pursuance of this purpose, defendant started to build one of these tenement houses directly on the line of plaintiff's land, and thus distant only thirteen feet from plaintiff's house. Upon these facts the petition prays for an injunction restraining the defendant from erecting such buildings. Defendant answered this petition by general and special denials. The case was called for trial, and from the plaintiff's testimony the ownership of the land appeared as alleged; also the occupation of plaintiff's land by himself as a homestead, the efforts of defendant to purchase plaintiff's property, defendant's expressed intention of erecting small houses close to plaintiff's land and renting them to negroes, to annoy plaintiff's family and force him to accept the offer, and also defendant's statement that he would make plaintiff sorry for refusing the offer, and that when he had forced plaintiff out of his homestead, he would move away the buildings. In pursuance of this intention, he erected a small building about twenty feet by twelve feet, placing it within four feet of plaintiff's land. It was without cellar or foundation walls, and so constructed that it could be removed without injury. It was a house of two rooms, was painted, and of itself looked neat, and would rent for some five or six dollars a month. When completed, it was rented to a colored preacher, who occupied it with his family, consisting of himself, wife and one child. This family behaved well. Such was the substance of the testimony. Plaintiff's complaint was, that defendant built this house close to his home and put this family into it for the purpose of annoying plaintiff, and not for the purpose of improving his own property. We have stated the allegations of the petition and the substance of plaintiff's testimony at length, in order that the full ground of plaintiff's complaint may be perceived. Stated briefly it is, that defendant, the owner of adjacent lands, provoked at plaintiff because of his refusal to sell at his terms, and for the sake of annoying plaintiff and his family, erected small tenement houses close to plaintiff's land and rented them to negroes. Do these facts entitle him to an injunction? Plaintiff invokes the familiar maxim, "*Sic utere tuo ut alienum non lœdas*," and insists that under that he is entitled to the injunction prayed for. It will be perceived that

plaintiff's complaint is two-fold: first, as to the kind of buildings that defendant is erecting; and second, the uses to which he intends putting them. He complains that defendant is erecting small shanties, and that he proposes filling them with worthless negroes. His testimony fails to fully sustain his allegations. It is true the building defendant has erected is a small tenement house of but two rooms, without cellar or foundation walls, and yet the plaintiff himself says the building looks neat. The building is rented to a negro family, but that family is the family of a preacher and well behaved. It cannot therefore be said that defendant is filling his buildings with worthless negroes. Now does the fact that defendant is improving his property with small tenement houses — houses which do not compare favorably with plaintiff's homestead — and that he is renting those houses to negro families, give plaintiff a right to interfere by an injunction simply on the ground that defendant is so acting for the purpose of annoying plaintiff? We think not. Doubtless a party may obtain an injunction to restrain a neighbor from erecting or continuing on his premises a nuisance, but that as a general rule is the limit of interference. A man has a right to improve his own property in any way he sees fit, providing the improvement is not such a one as the law will pronounce a nuisance, and this he may do although he make such improvement through spite. And it may be laid down as a universal rule, that the size and quality of the improvement never of themselves constitute it a nuisance. A land-owner may erect upon his land the smallest or most temporary kind of dwelling-house or store in close proximity to the finest mansion or block of buildings, and that for the mere sake of spiting the owner of such mansion or block of buildings by the contrast, without becoming subject to restraint at the hands of the courts. In other words, if the improvement itself is legitimate and lawful, is not *per se* a nuisance, the law will not inquire into the motives with which he acts. It is true the law will interfere to prevent the erection of a nuisance such as a stable, out-building, etc., but not to prevent the erection of a store, tenement, or any thing of that nature. Even where the building may or not become a nuisance, according to the manner in which it is used, the erection of the building will not be restrained. High in his work on Injunctions, § 488, says:

“Where the injury complained of is not, *per se*, a nuisance, but may or may not become so, according to circumstances, and where

it is uncertain, indefinite or contingent, or productive of only possible injury, equity will not interfere. Thus the erection of a wharf, a railroad bridge, a planing mill, a livery stable, or a turpentine distillery, will not be enjoined where the injury is only a possible and contingent one."

And in support thereof cites several authorities. Again, in section 496, the author states :

"It is no ground for interference that the erection of the alleged nuisance would prevent the use of surrounding property for such buildings, as in the ordinary course of affairs and the extension of a city would be erected, or that it would increase the rate of insurance on surrounding buildings."

Of course, these tenement houses, though small, would when rented bring an income to the defendant, and although he might have means to erect larger buildings and thus obtain a higher income, the size of the buildings is a matter for his judgment alone to determine. Again, even after buildings which are in themselves perfectly legitimate and proper are erected, they may be put to uses which are illegitimate and improper, which will constitute them nuisances and justify the interference of a court of equity. Thus if dwelling-houses are used as houses of ill-fame, a court of equity will restrain such use. But the interference will be only to enjoin the use and not to destroy the buildings. But equity will not interfere simply because the occupants of such house are by reason of race, color, or habits, disagreeable or offensive. A negro family is not, *per se*, a nuisance, and a white man cannot prevent his neighbor from renting his home to a negro family any more than he can to a German, an Irish, or a French family. The law makes no distinction on account of race or color, and recognizes no prejudices arising therefrom. As long as that neighbor's family is well-behaved, it matters not what the color, race, or habits may be, or how offensive personally or socially it may be to plaintiff; plaintiff has no cause of complaint in the courts. We think therefore that neither the size nor character of the building erected, nor the use to which it is put, justified any interference on the part of the courts. The defendant used this property for his own benefit in a legitimate way, created no nuisance, and though he may have acted with the utmost spite against the plaintiff, yet so long as he keeps within the limits of legal action, the courts will not interfere. We have examined the various cases cited by plaintiff, and see none directly

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in point, or that will sustain his cause of action. The case of *Harbison v. White*, 46 Conn. 106, was decided under a local statute attempting certain police regulations. But even that does not conflict with this decision. The other cases are cases in which the acts enjoined were of themselves nuisances. We find no case in which a party seeking to place an improvement upon his own land, an improvement which will increase his income, which improvement is not a nuisance, which does not endanger the physical health or comfort of his neighbor, is restrained from such improvement on the ground that it is annoying and disagreeable to such neighbor, that it does not correspond in character and kind with the improvements on such neighbor's premises, that it would bring a different class of people socially into immediate proximity to his neighbor, and that all this was done and intended through spite against such neighbor. We think therefore the judgment of the District Court was right, and it must be affirmed; and it is so ordered.

Judgment affirmed.

All the justices concurring.

FIRST NATIONAL BANK OF FORT SCOTT V DRAKE.

(29 Kans. 311.)

Corporation — agency — ratification

The cashier of a bank, having agreed to discharge his duties without compensation, appropriated funds of the bank for compensation. Knowing that the rules of the bank forbade interest on demand certificates, he issued demand certificates on interest to himself, and took funds of the bank to pay such interest. He also sold bonds belonging to the bank to himself for less than their value. These transactions were entered on the bank books, but the directors had no actual knowledge thereof. *Held*, that a ratification by the bank could not be implied.

ACTION to recover money wrongfully appropriated. The opinion states the case. The defendant had judgment below.

Ware & Ware, and *J. D. McCleverty*, for plaintiff in error.

A. A. Harris and *Blair & Perry*, for defendant in error.

BREWER, J. This was an action in the District Court of Bourbon county, brought by plaintiff in error, plaintiff below, to recover of defendant money claimed to have been wrongfully appropriated by him while acting as officer of said plaintiff bank. The case was tried by the court, with a jury. At the close of plaintiff's evidence a demurrer thereto was sustained, and judgment entered in behalf of the defendant; and now the plaintiff brings the record here for review. There are three separate transactions alleged in the petition, and supported by the testimony, in respect to each of which the plaintiff claims the right to recover. The facts are these: The plaintiff since 1871 has been a National bank, incorporated under the laws of Congress. During all of the transactions hereinafter stated defendant was one of its directors. Prior to May, 7, 1877, one L. C. Nelson had been its cashier, under a salary prescribed by the board of directors, of \$1,800 per annum. At that time he resigned, and defendant was appointed his successor, and continued to act as cashier until July 7, 1880. The plaintiff claims (1) that this change of cashier was made in the interest of economy, and upon the agreement on the part of defendant that if he could have office room in the bank building for the transaction of his private business, and could keep his private safe and papers there, he would discharge the duties of cashier without compensation; and that notwithstanding this agreement, the defendant did charge up on the books of the bank and appropriate to himself the sum of \$3,165.50 as salary as cashier. The bank claims (2) that by one of its rules no interest was payable on demand certificates of deposit; that this rule was known to defendant as its cashier, and enforced by him generally as to third parties; but that notwithstanding this, he caused to be issued to himself demand certificates drawing large interest, and took thereon from the funds of the bank as interest on such certificates the sum of \$2,203.97; and (3) that the bank was the owner of \$10,000 of Bourbon county bonds, for which it had paid \$9,314.80, and that the bonds were at the time of the following transaction worth par and accrued interest; that as officer of the bank, defendant sold these bonds to himself for \$9,300 — \$14.80 less than the bank paid for them, and \$846.66 less than they were worth.

These are the three matters of which the plaintiff complains, and in support of which it offered testimony. We shall not attempt to review the testimony, or state in detail what it was. It is enough

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to say that there was testimony tending to sustain the plaintiff's claim ; testimony from which a jury might find the facts to be as alleged. We do not say that the jury must necessarily have found them to be so, but simply that they might have so found them. Hence, for the purposes of this inquiry they must be taken as so found, for it is a familiar rule in respect to demurrers to evidence, that they can be sustained only when upon any and all facts which may properly be found by the jury from the testimony presented, the plaintiff, as matter of law, is not entitled to recover. So without attempting to weigh or compare conflicting matters of testimony, or to conjecture what the jury would probably have found to be the facts, it must be accepted for the purposes of the present inquiry as true, (1) that defendant was appointed and accepted the position of cashier upon the agreement that he would discharge its duties without compensation, other than office, safe and desk room for his private business ; and notwithstanding such agreement, actually took and appropriated to himself of the funds of the bank the sum stated as compensation ; (2) that the rules of the bank, known to himself, forbade interest on demand certificates ; that in defiance of those rules, he caused to be issued to himself demand certificates drawing interest, and actually took from the funds of the bank the sum stated as interest on such certificates ; (3) that as an officer of the bank, he sold the Bourbon county bonds, worth par and accrued interest, as above stated, to himself for \$846.66 less than they were worth.

These being facts, can the plaintiff recover, and if not, what legal obstacle to recovery appears ? The defendant, denying of course some of the facts above stated, claims that even if they be literally true, all the transactions were duly entered on the general books of the bank, open to the inspection of the officers and directors ; that in law the directors are conclusively presumed to have known the fact of these entries, as well as his entire action in respect to these matters, and that thereby they acquiesced in and ratified his action. In other words, that the directors might in the first instance have bound the bank by giving him the sum taken as salary ; and that knowing he was so taking it, they acquiesced in and ratified the act, which is the same as though in the first instance they had contracted to give it to him. Also, that they could lawfully and properly agree to pay interest on demand certificates as well as upon any other indebtedness of the bank ; that if they

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deemed the interests of the bank required, they could pay interest to one party and not to another. In short, that their judgment as to the best interest of the bank in the matter of interest was finally conclusive, and that their knowledge that he was taking such certificates and such interest was equivalent to a direct authority therefor, and bound the bank to the same extent that a prior resolution directing it would. And also that they had power to sell any of the properties of the bank for such a sum as they deemed best; that their action could not be repudiated by the bank simply by proof that the property was in fact worth more than they received; and their knowledge that the property was sold for such a sum is equivalent to a sale directly by their authority. Furthermore, it is contended that during all these transactions, the defendant was a large owner of the stock in the bank; that at the time of the bond matter, he in fact owned over four-fifths of the stock, which in October, 1880, he sold; and that the purchaser then bought into the bank, taking the assets as they were, and with no right to challenge prior transactions between the bank and its officers. As the learned court, before whom the case was tried, said in the opinion sustaining this demurrer:

“Drake himself was practically the bank; its assets and its property were his; the profits, if any, were his; the losses, if any, were his; and he could do with his funds and assets just what he pleased; but of course, as before stated, he could not mismanage or misappropriate the funds of the bank against any depositor or creditor, not consenting; and if he should do so, the law could, and in a proper action would, redress their grievances. But no *cestui que trust* is alleging any grievance here. The action is brought in the name of the bank by the present owners, who purchased the bank from Mr. Drake himself; and without alleging any fraud upon themselves in their purchase, without alleging that they did not obtain all they purchased, they seek to recover what they did not buy nor pay for, by going back and alleging that during his management he reduced the assets of the bank by paying himself a salary he was not entitled to; by paying himself interest upon deposits for which he held certificates; and by purchasing bonds from the bank at less than their value.”

It will help to a clearer understanding of the questions involved, to consider the rights of the parties independent of the two matters

of defense suggested, and here we find two propositions involved: (1) An agent contracting to work for his employer at a stipulated compensation, and being in possession of his employer's funds, appropriates a larger amount in payment of his services. (2) An agent acting on behalf of his principal, contracts with himself to the prejudice of the interests and against the instructions of his principal. The bare statement of these propositions is enough. If A. agrees to work for B. for \$100 a month, that contract determines the limit of his compensation. The same rule obtains, if instead of a money compensation, he contracts to work for office, desk and safe room. The contract measures both rights and obligations. The agent alone may not change it, and this notwithstanding his services may have been of incalculable benefit to his principal. His possession and control of the funds of his principal give him no added rights. A failure to return all funds and properties of such principal in excess of the stipulated compensation gives to such principal a clear and undisputed right of action. Neither is the rule changed by the fact that the principal is an incorporation and the agent its chief executive and managing officer. These propositions are elementary.

[Omitting a review of authorities.]

We have cited these authorities, not because the two propositions above stated need support, but as indicating to what extent they have been carried. Further, they prepare for a better appreciation of the defenses presented. If we were to follow some of them to their full extent, we might safely concede the premises of defendant's argument, and still deny his conclusions. Thus if the directors have no power to bind the corporation by a direct vote, granting pay for past services in any capacity to one of their number who agreed to serve without compensation, *a fortiori*, the corporation is not concluded by a presumed ratification through a supposed knowledge and acquiescence on the part of such directors. What cannot be done directly through lack of power, is never accomplished indirectly by silence, acquiescence and ratification. But let us examine the argument of defendant. It may be stated briefly thus: The directors might by a prior vote have authorized everything that defendant did. That which they could authorize, they can ratify. They are conclusively presumed to know the general condition and management of the bank, and included in this, the receipts and disbursements as in fact made and as shown by the en-

tries on its general books. Therefore the directors knew what defendant was doing, and acquiescing therein, they ratified his actions. We think this argument as applied to the facts of this case is open to several objections. The testimony shows, or tends to show at least, that in fact the directors did not know what defendant was doing, and therefore did not consciously approve and ratify his actions. Now this legal imputation of knowledge cuts both ways. If the directors are, because they are directors, conclusively presumed to know what he, as cashier, is doing and omitting to do, then likewise he, as a director, is conclusively presumed to know what the other directors, as individual officers, and what the board of directors as a whole, are doing or omitting to do. If they know that he is taking funds of the bank without authority, he knows that they do not ratify it. He knows their acts and omissions as well as they his. Indeed it is more justly and certainly to be presumed that one director knows what his fellows, single or as a board, are doing or omitting, than that the board should know what an executive officer or clerk is doing or omitting. This imputation of knowledge is of course a mere legal fiction, and it makes against as well as for the defendant. If it is good in favor of a director, it is equally good against him. In short, it leaves the parties to rest their rights and liabilities on the actual facts of an authority and conduct.

Again, conceding that the legal presumption of knowledge is supported by proof of actual knowledge, still ratification would not follow as matter of law. The directors may know that a cashier is disobeying the rules of the bank, and still a failure to take immediate action in disavowal does not, as matter of law, operate to ratify and validate such disobedient act. Knowledge and failure to act may be evidence, sometimes very strong and conclusive evidence, of ratification; but still it is only evidence tending to prove a fact which with other testimony bearing upon the same fact is generally to be weighed by the jury rather than by the court. If the act is done under a mistaken belief in the existence of authority, then knowledge with acquiescence for any length of time tends strongly to prove ratification. But if the authority is known to be wanting, if further, the act is known to be expressly forbidden and to be directly and substantially prejudicial to the interest of the bank, then a failure to take active measures in disavowal may be weak and inconclusive evidence of a ratification. Take the case at bar

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for illustration: Ignore all matter of presumption, and assume that actual knowledge was conclusively proved; then if from a misunderstanding as to the real agreement, or upon a supposed authority, defendant charged up his salary on the books of the bank and took the money therefor, and the directors, fully aware of this condition of things, made no objection for a series of months, such acquiescence would make strongly in favor of the correctness of defendant's understanding of the agreement, and would be very conclusive evidence of the ratification of his action. But if both he and they knew that the agreement was plainly that he should act as cashier without other compensation than office, desk and safe room for his private business, and that notwithstanding this, and without pretense of right, he charged up a salary and took the money therefor, then the failure of the directors to act is far weaker evidence of ratification. It does not tend to show what was the real agreement; for by the supposition, both parties knew the agreement, and that it forbade the defendant's act. Instead of being a ratification of an unauthorized act, it may have been a mere tolerance of a known wrong, and this in consequence of the present pressure of other and more important considerations. Where both parties know that an act is wrong, the failure of one to object to or resist it does not make it right for the other.

But what is ratification? Counsel for plaintiff in error say it is the acceptance by a principal of the acts of one, who without original authority, acted with third parties, in the name of such principal; that it is therefore only a branch of the doctrine of principal and agent. This is too limited. Burrill, in his Law Dictionary, says that "ratification is the confirmation of a previous act done either by the party himself, or by another; that it is the confirmation of a voidable act," and cites as authority, Story on Agency, §§ 250, 251; and also, 2 Kent Com. 237. One of those citations treats of the relation of principal and agent, the other of the confirmation of the acts of an infant by himself after becoming of age. Bouvier, in his Law Dictionary, gives similar scope to the meaning of ratification. We think therefore it will not do to say that it is strictly a branch of the doctrine of principal and agent. It is the confirmation of a voidable act. It is entirely immaterial what that is which renders the act voidable; whether a lack of present power to make a valid contract, as in the case of infancy, or because of fraud and misrepresentation on the part of

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the other contracting party, or because it is the unauthorized attempt of an assumed agent to bind his principal. Wherever there is a voidable act, confirmation of that act by the party assumed to be bound is in law a ratification. But in order to constitute a valid ratification there must be knowledge. In Bouvier's Law Dictionary the author says: "The ratification must be voluntary, deliberate and intelligent, and the party must know that without it he would not be bound." In Story on Agency, § 239, the author says: "Where the principal, upon a full knowledge of all circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully to all intents and purposes, as if he had originally given him direct authority in the premises to the extent which such acts, doings or omissions reach," citing *Hardeman v. Ford*, 12 Ga. 205; *Billings v. Morrow*, 7 Cal. 171; *Rld. Co. v. Gazzam*, 32 Penn. St. 340.

Again "while the act of an agent, though unauthorized at the time, may become binding upon the principal by ratification and adoption, to make such ratification effectual it must be shown that there was previous knowledge on the part of the principal of all the material facts and circumstances attending the act to be ratified; and if the principal assent to the act while ignorant of the facts attending it, he may disaffirm it when informed of such facts." *Adams Ex. Co. v. Trego*, 35 Md. 47; see also, *Combs v. Scott*, 12 Allen, 493. Indeed in the very nature of things, this must be true. The effect of ratification is to create a contract; but a contract implies assent, and how can there be assent without knowledge? That by all the books is one of the essentials to a contract; and this brings us to the inquiry as to the matter of knowledge.

Assuming that these acts of the defendant are shown to have been done without previous authority, they would be binding on the bank only, because ratified by it, and no ratification is proved unless knowledge is shown. The directors constitute the governing body of the bank; the bank itself being an incorporeal entity, without power to see or know. The directory constitutes the visible representative, the thinking, knowing head of the bank. Its knowledge and purpose is the knowledge and purpose of the bank; and here we meet the proposition upon which the defendant rests, that the directors are in law conclusively presumed to know the condition of the bank, its business, receipts and expenditures, and all the general facts which go to make up that condition and busi-

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ness, as shown by the entries on its regular books; and in support of this proposition are cited the cases of *Merch. Bk. v. Rudolph*, 5 Neb. 527; *Rich v. Bank*, 7 id. 201; *Sav. Bank v. Wulfekuhler*, 19 Kans. 60; *Arlington v. Pierce*, 122 Mass. 270; *Dunn v. St. Andrew's Church*, 14 Johns. 118; *U. S. Bank v. Dandridge*, 12 Wheat. 64; Morse on Banks and Banking, pp. 90, 91; Bigelow on Estoppel (1st ed.), p. 549; and Green's Brice's *Ultra Vires* (2d. ed.), chap. 6.

In 5 Neb. *supra*, it is said: "It is insisted that being the vice-president and one of the directors of the bank, he was in a situation which required him to know the condition of its business, and must be conclusively presumed to have known whether said note had been paid or not. No case directly in point has been cited, but we apprehend that the rule contended for is the correct one. In Morse on Banks and Banking, 90, 91, the author thus states the rule: 'The general control and government of all the affairs and transactions of the bank rests with the board of directors. For such purposes the board constitutes the corporation, and uniform usage imposes upon them the general superintendence and active management of the corporate concerns. They are bound to know what is done, beyond the merest matter of daily routine, and they are bound to know the system and rules arranged for its doing.'"

And in Bigelow, *supra*, we find the doctrine thus laid down: "In accordance with the principles in the above cases, directors of corporations being bound to know the proceedings of the body, cannot escape an estoppel by the allegation of ignorance."

In the case from our own court, Mr. Justice VALENTINE uses this language: "For while we assume, as a matter of fact, that Wulfekuhler knew nothing of the condition or management of the bank, and nothing of the condition of Herman's account with the bank, yet still, as a matter of law, we think we must presume that he knew all about these matters. He was a director and the vice-president of the bank, and it was his duty to have such knowledge and therefore the law will conclusively presume that he had it."

These authorities abundantly establish the proposition that there is as to the directory a certain legal presumption of knowledge as to the transactions, business and condition of the bank, which is conclusive upon the bank, and against the existence of which, as a matter of fact, no testimony will be received. Upon this doctrine rests substantially the burden of the defense. We are not disposed

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to limit or restrict the scope of this doctrine. It is one founded in public policy, essential to the safety of third parties in their dealings with the bank, and to the protection of the stockholders interested in its welfare and safe management. So far as is necessary to accomplish these results, it should be carefully and strictly upheld; but it should not be carried beyond this, or to such an extent as to work injury to the bank. Its purpose is to impose the strictest fidelity and watchfulness upon the directors as custodians of a most important and delicate trust; a purpose which would be thwarted if it were turned into an instrument of injury and destruction to the bank and its stockholders.

The directory, as has been said, is the visible representative of the bank. Persons dealing with it meet only this visible representative, and have a right to presume that it knows all of the affairs of the bank, all that the bank as a principal ought to know of its condition and business. On the other hand, the stockholders and depositors — the persons who are pecuniarily interested in the safe management and prosperity of the bank — look to the directors as the chosen guardians of their interests, and have a right to demand of them that they watch over all those interests in their minute details. So that all of these parties have a right to assume that the directors know all the transactions, business and condition of the bank; because they ought to know them and because otherwise they do not discharge their full duties to these various parties. But as to an officer and director the reason for this conclusive presumption fails, and therefore the presumption itself should not be held to exist. Upon the defendant as director and officer rests the same measure of responsibility as upon all the other officers and directors. He is presumed to know as much as they are presumed to know. He is within the inner circle of the bank's life, and by ordinary attention may in fact know all that is necessary to govern his action, or to measure his duties and obligations. Presumptions are for the benefit of those outside, who cannot in fact know, and who must rely upon the representations and acts of those inside. But for those inside the bank, there is no need of any presumption, and for the simple reason that they are where they may in fact know.

Again the successful management of a bank requires the fullest confidence and co-operation between the directors and employees. Every fact which each knows, which the other ought to know,

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should be told. No one has a right to withhold a fact, within his own knowledge, of interest to the bank, and which ought to be known by any other officer or director; and no rule is wise or should be upheld which encourages secrecy in such matters on the part of any officer. If a cashier is taking money, claiming it as salary, he ought to see to it that the directors know the fact; and no rule should be tolerated which makes it profitable for him to take the money secretly and without their knowledge.

Again no officer should be permitted to enforce his own wrong against his principal, the bank, through the inattention or neglect of any other agents of the bank. Clearly, one agent cannot empower another to do wrong. Can the inattention and neglect of the former make the wrong of the latter effective and remediless? *Minor v. Bank*, 1 Pet. 46. Any other rule would put it in the power of the officers of the bank to plunder it enormously in safety. Let the book-keeper and cashier of any bank combine, and it is easy to see how they could for a length of time continue plundering the bank unknown to any one, and this though every transaction should be entered on the books of the bank. This, which is so obviously possible, as a matter of fact not unfrequently occurs. In such cases, can it for a moment be held that the ignorance of the directors condones the wrong, or leaves the bank without remedy? This it may be said is a glaring illustration, but the principle which underlies this is the same as that controlling the case at bar. If as a matter of fact defendant took the office of cashier upon an express contract to receive as compensation therefor nothing but office, desk and safe room for his private business, and did notwithstanding this contract, without the knowledge and authority of the board of directors, take the money he is charged to have taken, it was as unmistakable and glaring a violation of official duty, as gross a wrong upon the bank and its stockholders, as though a cashier and book-keeper should combine and surreptitiously take from the vaults of the bank the money placed with it by the depositors. The cashier prior to the defendant was allowed a salary of \$1,800. Supposing he had taken \$5,000 out of the vault and charged it to himself on the books of the bank as salary, and the entry had escaped the notice of the directors for a length of time; could not the bank show the fact, and recover the excess? or would the ignorance and carelessness of the directors be equivalent to voting him a salary of \$5,000? Public policy unquestionably withholds its sanction from any doctrine

which will work out such pernicious results. It sustains the doctrine of imputed knowledge on the part of the directors, only so far as will protect the dealings of third parties with the bank, or will prevent the bank from suffering through inattention or wrong from the directors themselves ; and will not carry it to the inner management of the bank, or prevent full inquiry as to the facts of any transaction therein, or the actual authority for any act done by its officers. We think therefore the principal ground for the defense cannot be sustained. As to the other, little need be said. The fact that the defendant owned four-fifths of the stock did not authorize him to do with the assets of the bank what he pleased ; the directors of the bank, and not he, acted for it. His ownership of the stock gave him voice only in electing the directors : when elected, his control of the actions of the bank ceased. If he had taken moneys which belonged to the bank, he could not defend against an action brought by it to recover such moneys by proof that he owned four-fifths of the stock. Unless he owned all the stock, he could not condone his own wrong or prevent the bank from recovering the full amount, and thus protecting the interest of the lesser stockholders. In *Hazard v. Durant*, 11 R. I. 196, a suit was brought by a stockholder to compel the president to account for funds belonging to the company, which the president had converted to his own use. The defendant pleaded a ratification, but the court said : " To hold that a corporation could gratuitously condone or release such a fraud by any thing short of unanimous consent would be monstrous ; for it would be in effect to hold that a president or director who can control a majority vote in the corporation may rob or despoil it with impunity. "

In *Bayshaw v. Railroad*, 7 Hare, 129, the vice chancellor says : " I think the plaintiff in this case has shown that the directors have misapplied, and are about to misapply the £100,000 I have adverted to, that is, the £100,000 raised under the Hadleigh act. No majority of the shareholders, however large, could sanction the misappropriation of this portion of the capital. A single dissenting vote would frustrate the wishes of the majority. Indeed, in strictness, even unanimity would not make the act lawful. "

See also *Kent v. Mining Co.*, 78 N. Y. 159. And if defendant could not defend against the action of the bank by proof that he owned four-fifths of the stock, if the bank had a cause of action notwithstanding such ownership, we fail to see any principle upon

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which his sale of stock destroyed the bank's right of action, or gave him a new defense. It follows from these considerations that the District Court erred in sustaining the demurrer to the evidence, and that the judgment must therefore be reversed, and the cause remanded for a new trial.

As this case goes back for a new trial, we desire to add, to guard against any misconception, that we do not agree with all the authorities heretofore cited as to the lack of power on the part of the directors to appropriate money in payment of the salary of the cashier, or other officers, after the services have been rendered, and in cases when such cashier or other officer happens to be a director: we think the rule is, in the absence of positive restrictions, that where no salary is prescribed, one appointed to an executive office, like that of cashier, is entitled to reasonable compensation for his services, and that the directors have power to fix the salary after the expiration of the term of office, and this though such appointee is also a director and continues to be such while holding the independent office.

Again, while we do not think it can be said as a matter of law, that the directors are conclusively presumed to know the general business and condition of the bank as shown by the entries on its books, in a case of this kind, and thus to ratify the action of the cashier in fixing his own salary and in taking the fund of the bank in payment thereof, yet we think a question of fact may often be presented which is fairly to be submitted to a jury for its determination, and that is, whether independent of any proofs of actual knowledge, the action of the cashier has not been so open and long continued and under such circumstances, that it may be inferred as matter of fact that the directors assented to the payment of such salary. We think the questions rather to be treated as a question of fact and to be determined by a jury, as to whether the bank acquiesced in and ratified the action of the cashier, than to be disposed of as a question of law, and dependent upon a purely legal presumption.

We do not care to pursue the discussion further. The judgment will be reversed, and the case remanded for a new trial.

Judgment reversed.

All the justices concurring.

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(29 Kans. 406.)

Evidence — surgical examination, when ordered.

In an action of damages for permanent injury to the eyes, the plaintiff having testified, and no medical expert having testified, the court may order the plaintiff to submit to an examination by a competent expert.

ACTION of damages for personal injuries by negligence. The opinion states the point. The plaintiff had judgment below.

Geo. R. Peck, and W. C. Campbell, for plaintiff in error.

Case & Curtis, for defendant in error.

VALENTINE, J. This was an action brought by John Thul against the Atchison, Topeka & Santa Fe Railroad Company, to recover damages for injuries alleged to have been caused through the negligence of the agents and servants of the defendant. The alleged injuries occurred about the 15th of December, 1881. At that time Thul was in the employ of the defendant as a section hand; and as he and other employees of the company were going out from Topeka on a hand-car to their place of work they met an approaching train; they took the hand-car off the track, and were standing near the track waiting for the train to pass. When the engine came opposite the plaintiff and his co-laborers, the plaintiff alleges that:

"The fireman, engineers and servants of the said defendant in charge of said engine, needlessly, carelessly * * * caused the hot steam and hot water then in said engine and the boiler thereof to be thrown, squirted and ejected with great force and violence upon the person of, and into the face and eyes of the said plaintiff, * * * and thereby wounded, bruised, injured, scalded and burned the person, eyelids and eyes of the said plaintiff, so that * * * the sight of the said plaintiff was, and ever since has been impaired, injured and destroyed," etc.

The case was tried before the court and a jury, and a verdict and judgment were rendered in favor of the plaintiff and against

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the defendant for \$400 and costs ; and to reverse this judgment the defendant now brings the case to this court.

Upon the trial, the plaintiff introduced his evidence, and rested. The evidence tended to prove the plaintiff's entire case. It showed the manner in which he was injured, and the nature, character and extent of the injury. And the evidence as well as the plaintiff's petition, showed that it was the injury to the plaintiff's eyes of which he principally complained. The plaintiff himself was a witness in the case, and testified in his own behalf. After the plaintiff rested his case, the defendant requested the court to have the plaintiff submit himself to the examination of Dr. A. D. Williams, who was then present, from St. Louis, and whom it was stated the defendant would call as a witness. This request was made in the following words, to wit : " If the court please, we ask that the plaintiff in this case, John Thul, submit himself to the examination of Dr. Williams, a witness we shall call for the defense, now here from St. Louis." This request was objected to by the plaintiff, in the following words to wit : " We object, under the ruling of the 53d Missouri Report." The court below sustained the objection, in the following words, to wit : " The objection is sustained." And to this ruling of the court the defendant excepted. Counsel for the defendant then addressed the court as follows : " What we want to do, if the court please, is to have this plaintiff submit himself to the examination of Drs. Jones, Redden, Stormont and Williams of St. Louis, whom we propose to produce as witnesses on the stand; and we ask the permission and order of the court that so many doctors as we may desire may have an opportunity to make an examination of the plaintiff's eyes in the presence of this court and jury."

To this the counsel for plaintiff responded as follows : " We object." And the court then answered as follows : " The objection is sustained." To which ruling of the court the defendant again excepted. Afterward, counsel for the defendant addressed the court as follows : " If the court please, the examination that we desire the plaintiff to submit himself to, and ask the court to order, is for the purpose of these doctors appearing upon the stand and testifying to the cause of his malady as it exists, the permanency of his injuries, and the cause that produced them."

After the evidence was closed, the court gave the following among other instructions to the jury : " 6. As to the meas-

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ure of damages: If the jury find for the plaintiff they will assess the damages, taking into consideration the injury inflicted upon him, whether of a temporary or permanent character; his loss, if any, arising from any inability to perform labor or use his eyes in consequence of such injury; his loss of time, if any; his physical pain, and other circumstances connected with said injury, and which may be reasonably attributable to it, and were caused thereby."

We think these are about the only facts necessary to be stated, for the purpose of giving and insuring a correct understanding of the questions involved in the case as the same are now presented to us. It will be observed from the foregoing facts that the main question involved in this case is whether the court below erred in overruling the defendant's request for a medical examination of the plaintiff, and in sustaining the plaintiff's objection to such request.

That portion of the 53d Missouri Report, upon which the plaintiff made this objection, as follows: "The proposal of the court to call in two surgeons, and have the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law. There was abundant evidence on this subject on both sides; any opinion of physicians or surgeons at that time would have only been cumulative evidence at best, and the court had no power to enforce such an order." *Lloyd v. H. & St. Jo. R. Co.*, 53 Mo. 509, 515, 516.

The objection, we would think from the facts of the present case and from this citation, was based upon the grounds that such a practice is unknown to the law, and that the court had no power to enforce the order for such an examination. We think it could not have been because there was already abundant evidence upon the subject in this case, for at the time the request was made no physician or surgeon or medical expert of any kind had testified in the case; and indeed at the close of the evidence no physician or surgeon or medical expert had testified in the case except Dr. Williams, and he could not testify intelligently upon the subject, for the reason that he had made no personal examination of the plaintiff.

Upon the same question we would quote from a decision made by the Supreme Court of Iowa, in the case of *Schræder v. C. R. I. & P. R. Co.*, 47 Iowa, 375, 378, *et seq.*:

"III. The plaintiff must be regarded as objecting to an examination of the diseased parts of his body by competent physicians and surgeons, although no objection thereto was formally expressed by him. His resistance of the application made by defendant, and his objection to the interrogatory, must be regarded as a refusal on his part to consent to an examination. The first ruling of the court is based upon the ground that it possessed no authority to order the examination, as a matter of right possessed by defendant. We are to understand that the like reason controlled the decision upon the competency of the question objected to by defendant. It seems quite clear that if defendant had no right to require plaintiff to submit to an examination of his person the court rightly decided in overruling defendant's application. The same is true as to the ruling upon the interrogatory. If the plaintiff had answered the question negatively, or refused to answer, the court could not, in this view of the law, have required an answer or required plaintiff to submit to the examination; therefore if the rule recognized by the court is correct, it would have been vain to have ruled differently.

"The converse of this proposition must be true, namely: If the defendant was entitled as a matter of right, to have the person of plaintiff examined, the court possessed the authority and power to order it, and enforce its order. This cannot be doubted. As to the manner of enforcing the order, we may have something to say hereafter. As the decisions of the court under consideration were based upon the view that defendant could not demand the examination of plaintiff as a matter of right, the soundness of the decision must be first considered.

"Whoever is a party to an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden, injustice will be done. The right of the suitor then, to demand the whole truth, is unquestioned; it is the correlative of the right to exact justice. It is true indeed that on account of the imperfections incident to human nature, perfect truth may not always be attained; and it is well understood that exact justice cannot, because of the inability of courts to obtain truth in entire fullness, be always administered. We are often compelled to accept approximate justice as the best

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that courts can do in the administration of the law; but while the law is satisfied with approximate justice where exact justice cannot be attained, the courts should recognize no rules which stop at the first when the second is in reach. Those rules too which lead nearer the first, should be adopted in preference to others which end at points more remote. This doctrine lies at the foundation of the rules of evidence, though it must be confessed that the superstructure does not always fully conform thereto. Great progress however in a comparatively recent period, has been made, by legislation and judicial decisions, in the work of conforming the system of evidence to this germinal principle. The most notable of the steps in this progress is the abrogation of the rule which precluded parties to actions from giving testimony therein. This rule however was mistakenly supposed to be in harmony with the principle just stated. It was believed that the interest of parties to actions would cause them, as witnesses, to pervert the truth, or conceal it; but when it was discovered that as a rule this was an erroneous conclusion, legislation was invoked enabling parties to testify. The wisdom of the change has been fully indicated by experience. * * *

“To our minds the proposition is plain, that a proper examination by learned and skilled physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. • The plaintiff, as it were, had under his control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it.

“We will consider the objections urged to this view of the case. It hardly appears that the objections urged in the exceptions of plaintiff to defendant's application ought to be here considered, as the court below held none of them good, but decided the point upon the ground that defendant asked for a matter to which it had no right. It is however proper to remark, that the inability of plaintiff to pay physicians who should make the examination, was no impediment to the order, as defendant proposed to furnish the means required. The facts that the application was made after the jury was sworn, and plaintiff knew no physicians in the county of the trial, do not appear to be well founded objections to allowing the order, for it does not appear that ample time could not have been allowed by the court for the examination in a manner that

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would have proved satisfactory to plaintiff. The fact that defendant had present in court so many physicians, charged by plaintiff with having an undue interest against him, was no sound objection, for the court could have refused to appoint any such to make the examination.

“But it is urged the court was clothed with no power to enforce obedience of plaintiff, had such an order been made. Its power in our judgment was amply sufficient to coerce obedience. The plaintiff would have been ordered by the court, by submitting his person to examination, to permit the introduction of testimony in the case. His refusal would have been an impediment to the administration of justice, and a contempt of the court’s authority. He would have been subject to punishment as a recusant witness who refused to answer proper questions propounded to him. Should such recusancy too long delay the court, or prove an effective obstruction to the progress of the case, the court could have stricken from the pleadings all the allegations as to permanent injury, and withdrawn from the jury that part of the case. The plaintiff, by voluntarily withdrawing his claim for such injury, would have been relieved from the necessity of submitting to the examination, and proceedings as for contempt would have been suspended. When it is remembered that plaintiff was a witness before the court, that the examination of his person would have had the effect to elicit testimony from him, as upon a cross-examination, the power of the court over him will be readily understood.

“It is said that the examination would have subjected him to danger of his life, pain of body, and indignity to his person. The reply to this is, that it should not, and the court should have been careful to so order and direct. Under the explicit directions of the court, the physicians should have been restrained from imperiling, in any degree, the life or health of the plaintiff. The use of anæsthetics, opiates or drugs of any kind should have been forbidden, if indeed it had been proposed, and it should have prescribed that he should be subjected to no tests painful in their character. As to indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies. Those who effect insurance upon their lives, pensioners for disability incurred in the military service of the country, soldiers and sailors enlisting in the

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army and navy, all are subjected to rigid examinations of their bodies, and it is never esteemed a dishonor or indignity. The standing and character of the physicians who should have been appointed to make the examination would not only have secured plaintiff from insult and indignity, but would have been a guaranty that nothing would have been attempted which would have endangered his life or health.

“We have been able to find no case in which the question before us has been considered, and we have been referred to no authority by counsel that seems to have much application thereto. The courts have held in divorce cases, when the impotency of a party is in question, an examination may be ordered of the person alleged to be impotent. See 2 Bishop on Marriage and Divorce, § 590, *et seq.*, and notes. The foundation of this rule is the difficulty of reaching the truth in any other way than by an examination of the person. The authorities referred to may be regarded as giving some support to our conclusion.

“It is the practice of the courts of this State, sanctioned by more than one decision of this court, to permit plaintiffs who sue for personal injuries to exhibit to the jury their wounds or injured limbs, in order to show the extent of their disability or suffering. If for this purpose the plaintiff may exhibit his injuries, we see no reason why he may not in a proper case and under proper circumstances be required to do the same thing for a like purpose upon the request of the other party. If he may be required to exhibit his body to the jury, he ought to be required to submit to an examination of competent professional men.”

Mr. Bishop, in his work on Marriage and Divorce, speaking of medical and surgical examinations of the parties in actions in which the question of incurable impotence is involved, says that “in England, Scotland, France, and probably every other country where this impediment to marriage has been acknowledged, the courts have compelled the parties, when necessary, to submit their persons to such an examination ;” and “unless this rule of inspection is repugnant to our institutions and positive laws, it must be deemed to have been imported into this country by our forefathers.” And he favors the proposition that the rule has been adopted in this country, citing several cases, among others the cases of *Devanbagh v. Devanbagh*, 5 Paige, 554, 556; 28 Am. Dec. 443; *Newell v. Newell*, 9 id. 25; *Lebarron v. Lebarron*, 35 Vt. 365; *Anonymous*, 35 Ala. 226; 2 Bish. on Marr. and Div., § 590, *et seq.*

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In criminal cases a personal inspection of the defendant is generally not allowable, for an order of the court compelling the defendant to submit to a personal examination would virtually be compelling the defendant to "be a witness against himself," which is not allowable under section 10, Bill of Rights, of our Constitution. However where the examination is only for identification it is sometimes allowable. *State of Nevada v. Ah Chuoy*, 14 Nev. 79; s. c., 33 Am. Rep. 530. In the case just cited one of the witnesses testified that he knew the defendant, and knew that he had tattoo marks (a female head and bust) on his right forearm; and the court thereupon compelled the defendant, against his objection, to exhibit his arm in such a manner as to show the marks to the jury. The only cases to which we have been referred, or of which we have knowledge, which are strictly applicable to the present case, are the cases already cited from Iowa and Missouri. The Iowa case seems to be a carefully considered case, while the Missouri case does not; and hence, other things being equal, the Iowa case is entitled to the greater weight and consideration; and indeed upon general principles we would think that it comes nearer expressing the true and correct doctrine upon this subject. The tendency of modern adjudications and of modern thought is to open the door as wide as possible for the introduction of all evidence that may throw light upon the particular subject then undergoing investigation. All attainable evidence and instruments of evidence, within certain limitations, may be presented to the jury for their inspection and consideration, and all proper modes of investigation or inspection may be resorted to for the purpose of enabling the jury to arrive at just and correct conclusions. Many instruments of evidence, however, can be examined only by the aid of experts, and in such cases the aid of experts is not only allowable, but may be demanded as a matter of right by the party needing such aid.

It was shown in the present case by the testimony of Dr. Williams that the nature, the extent and the permanency of the injury to the plaintiff's eyes could not be determined with any reasonable degree of accuracy except by a careful examination, made by some oculist or person who had made diseases and affections of the eyes a special study; and we would naturally suppose that such would be the case, independent of the testimony of Dr. Williams. Hence it would seem that in a case like the present the evidence of some such expert who had made such an examination would be an almost

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indispensable necessity; but such evidence in many cases could not be obtained unless the plaintiff were first compelled by an order of the court to submit himself to a personal examination by some such expert. Now is such evidence to be lost and justice possibly defeated, or may the court order that such an examination may be had? We favor the proposition contained in the latter portion of this alternative. We would think that the defendant in a case like the present would be entitled as a matter of right, upon a proper application and upon a proper showing, to have an order made by the court compelling the plaintiff to submit himself to a personal examination for the purpose of ascertaining the nature, character, extent and permanency of his injuries; but of course the court should exercise a sound judicial discretion in making such an order. The right to the order, being founded upon necessity, would not of course extend beyond the necessities of the case. If sufficient evidence of this kind had already been introduced, the court of course would not be bound to make the order for the purpose of obtaining other merely cumulative evidence. This principle will perhaps explain the ruling of the Missouri court in the case of *Loyd v. H. & St. Jo. R. Co.*, *ante*, for the court in that case in deciding the question says that "there was abundant evidence upon this subject on both sides; any opinion of physicians or surgeons at that time would have only been cumulative evidence at best." The court of course would not be required to order an examination of the plaintiff by a greater number of experts than was actually necessary for the purposes of justice, and it would not be required to make the order unless the proposed experts were really competent to make the examination. The court would also have the right to exercise its discretion in other particulars as suggested by the decision in the Iowa case.

As before stated, we think the court below, in refusing to make any order in the present case, did so solely upon the grounds that such a practice is unknown to the law, and that the court had no power to enforce such an order. In this we think the court below was mistaken. We think the order should have been made; and that the court had ample authority to enforce the same if it had been made and resisted.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

Judgment reversed.

All the justices concurring.

EAGLE MANUFACTURING COMPANY V. JENNINGS.

(20 Kans. 657.)

Partnership—dissolution—assumption of debts by one partner—agreement of creditor to look to him.

Where a partnership is dissolved, one partner taking all the property and assuming all the debts, all the partners are still liable on an acceptance previously given for goods, although the vendor may have promised to release the retiring partners and look to the other alone, there being no new consideration for such promise.

ACTION on an acceptance. The opinion states the case. The defendant had judgment below.

E. Hill, and Sluss & Hatton, for plaintiff in error.

BREWER, J. Plaintiff in error, plaintiff below, brought its action against the defendant on an acceptance signed by the firm of Jennings & Whitney. The defendant claimed a release from liability thereon. The case was tried by the court without a jury, and judgment entered in favor of the defendant. Plaintiff alleges error, and the single question presented is, whether the testimony was sufficient to justify a finding of a release from liability. The facts are: In 1876 defendant and one N. C. Whitney were partners, doing business at Streator, Illinois. As such partners they purchased of the plaintiff certain agricultural implements, and for their price gave this acceptance in the name of the firm. That these implements were purchased by the firm, and that this acceptance was given by the firm and in the first instance binding upon this defendant as well as upon his partner, is conceded. In 1877 the firm dissolved, Whitney taking all the property and assuming all the liabilities. The acceptance has never been paid. Defendant claims that upon the dissolution the plaintiff agreed to take Whitney for the debt, and release him. All the officers of the plaintiff were witnesses, and testified that they never released defendant or accepted Whitney alone for the debt, and that they never authorized any one to enter into such an agreement for the plaintiff. The defendant on his direct examination testified as follows:

"I had an understanding with Whitney that he was to take the

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notes, goods, etc., of the firm of Jennings & Whitney, and pay the debts of the firm, including this draft, and I think an agent of the company was present at the conversation. If such agent was not present at the time Whitney and I had the understanding, he was present when it was stated to him afterward, and made no objection."

On cross-examination he said :

"I do not say, in the strict sense of the word, that I have been released from the payment of the draft by the Eagle Manufacturing Company, yet I think the company was knowing that there was an understanding between Whitney and myself, that he (Whitney) was to take care of that claim and pay it. To my knowledge the plaintiff never released me and accepted Whitney for the same, except as stated in my direct examination. I do not think that any member or agent of said plaintiff ever released me from liability on the same except as I have stated in my direct examination. The conversation above referred to was the only conversation I ever had in regard to release from said draft. I have never paid the draft sued on in this action. In the conversation above referred to, in the presence of the agent or plaintiff, the substance of it was in speaking of the indebtedness of the firm pertaining to the arrangement of Whitney and myself. I simply explained to him what the arrangements were between Whitney and me ; this was the only conversation I ever had on the subject of release, and this was all of said conversation."

Further than that, when the acceptance was presented to him in this State for payment, he made no claim of a release from liability, but simply said that he was unable to pay and that Whitney ought to have paid it. It is not pretended that at the time of the dissolution a new partner took defendant's place and such new firm assumed the debt, or that any additional security was given by Whitney, or that the original acceptance was taken up and new paper given, or that the plaintiff received any consideration whatever.

If this were all that there was in the case, there would not be room for the slightest doubt. The only question arises from the following matters : Defendant filed an affidavit for a continuance, for the purpose of obtaining the testimony of Whitney. Such affidavit stated as follows :

"Said defendant verily believes that said Whitney will testify that said Jennings was released from said acceptance mentioned in

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plaintiff's petition, and that the plaintiff was to look to and hold said Whitney as the only person liable thereon ; that there was an understanding between this affiant and said Whitney by and with the consent of said manufacturing company, plaintiff, that said Whitney was to pay said acceptance, said Jennings, this affiant, to be released therefrom."

Plaintiff consented that this should be received as the deposition of said Whitney ; the continuance was overruled, and the case went to trial. Is there enough in this, taken in connection with the other testimony, to sustain the judgment ? We are constrained to think not. In the first place, much of it is a mere statement of the conclusions of the witness, rather than of the facts which he saw and heard, and as such is objectionable testimony. *Shepard v. Pratt*, 16 Kans. 209. Again it fails to show any consideration for the alleged release. Still again, a legitimate inference is, that it refers to the same conversation and pretended release referred to by the defendant in his testimony. And still further, the answer which was filed contains no direct allegation of a release of defendant. All that it says in respect thereto is in these words :

"That this plaintiff had due notice of said dissolution and the assumption of all liabilities of said N. C. Whitney, and that they accepted him for the payment of said bill of exchange."

We think therefore, putting all these things together, that the judgment of the District Court ought not to be sustained. The partnership purchased plaintiff's goods ; it gave this acceptance ; the acceptance was clearly binding upon the defendant ; the dissolution of the partnership, the taking of all the partnership property, and the assumption of all partnership liabilities by Whitney, in no manner released defendant. The alleged promise of plaintiff was made after the dissolution, and not as an inducement to or consideration of it. The acceptance has never been paid. Upon the dissolution no new partner took defendant's place and furnished his responsibility as security to the plaintiff. No additional security of any kind was furnished ; the acceptance was not destroyed and new paper given. The plaintiff received absolutely no consideration, and even if it did promise (which is positively denied) that it would look to Whitney, such promise was entirely without consideration, and in no manner discharged the defendant. The defendant in his verified answer does not explicitly assert that he was ever released, and his testimony plainly shows that he was not.

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We think therefore that the judgment of the District Court ought not to be sustained ; that it must be reversed, and the case remanded for a new trial ; and it is so ordered.

All the justices concurring.

CASES
IN THE
SUPREME COURT
OF
IOWA.

CARTON V. ILLINOIS CENTRAL RAILROAD COMPANY.

(50 Iowa, 148.)

Constitutional law — inter-State commerce — regulation of freight charges

A legislative enactment fixing rates of charges for freight over railroads within the State cannot be applied to contracts for transportation from the State to points in other States. (*See note, p. 677*)

ACTION to recover excessive freight charges paid. The opinion states the case. The defendant had judgment below.

Huff & Reed and Brown & Carney, for appellants.

John F. Duncombe, for appellee.

ROTHROCK, J. I. It appears from an agreed statement of facts that between the 11th day of April, A. D. 1875, and the 14th day of April, 1876, the plaintiffs delivered to the defendant at Ackley, Iowa, to be shipped to Chicago, Illinois, through defendant, 129 car loads of wheat, and the defendant fixed the price and charged for freight thereon from Ackley to Chicago thirty-seven cents per 100 pounds, or \$74 per car load of 20,000 pounds; and between April

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14, 1876, and March 11, 1878, one hundred and twenty cars more, for which the defendant received and charged for shipment the same rate. The grain was loaded at Ackley in cars furnished by the defendant and carried through in bulk to Chicago in a continuous shipment. All of the cars were billed through from Ackley, Iowa, to Chicago, Illinois, and the defendant fixed the rate of freight and gave plaintiffs through shipping receipts to Chicago.

It is claimed that the freight thus charged and paid by the plaintiffs was in excess of that authorized by the laws of Iowa at that time in force; that the distance from Ackley, by defendant's road, to Dubuque on the Iowa State line is 132 miles; and the distance from Dubuque to Chicago by defendant's line is 202 miles, making a total distance through both States of 334 miles, and that the rate of freight fixed by the law of Illinois was at that time less than the rate fixed by the statute of Iowa. Damages are claimed for the difference between what was authorized by the law of Iowa to be charged for the transportation, for the whole distance, also for attorney's fees for prosecuting the action.

It is claimed by counsel for the defendant that the law of Iowa then in force, being chapter 68 of the acts of the fifteenth general assembly, by its plain language and meaning had no application to contracts made for the transportation of freight into other States. Section three of that act, so far as applicable to this case, is as follows :

“The tariff of rates established in the following schedule shall be considered the basis on which to compute the compensation for transporting freights, goods, merchandise or property over any kind of railroad within this State * * *.”

Some of us think this language excludes contracts for the transportation of freight to points without the State, but as the plaintiffs claim that these were contracts made in Iowa for through shipments to Chicago, and that by tacking the law of Illinois to the law of Iowa, thus making it one continuous haul, the rate for the continuous haul being in excess of that authorized by the law of Iowa, such excess may be recovered back. We think it is not necessary to put a construction upon the law of this State in this regard, but rest our decision upon another ground.

It is claimed by the defendant that whatever construction may be put on the law of this State, it can have no application to shipments of freight from this State to other States, because State legis-

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lation of that character is void as being contrary to article 1, section 8, of the Constitution of the United States, which confers upon Congress the power "to regulate commerce with foreign nations, and among the several States." Now if this position be correct it is needless to enter into a discussion of all the questions, so elaborately and ably discussed by counsel in this case. If the law of Iowa, conceding that it contemplates the control or regulation of shipment of freight to other States, is in that particular void, as being an infraction of the Federal Constitution, it cannot be enforced, and the defendant was not bound to obey it, and could fix its own freight tariff, and the plaintiffs cannot recover for a violation of the statute, whatever rights they may have.

It is not claimed that the fixing of rates of freight shipped from one State into another is not a regulation of commerce. "Any regulation of the transportation of freight upon the high seas, the lakes, the rivers, or upon the railroads, or other artificial channels of communication, is a regulation of commerce itself." *City of Council Bluffs v. K. C., St. J. & C. B. R. Co.*, 45 Iowa, 338. This has been repeatedly held by the Supreme Court of the United States. *Reading R. R. Co. v. Pennsylvania*, 15 Wall. 232; *Passenger* cases 7 How. 283; *State v. Wheeling Bridge Co.* 18 id. 421; *Gibbons v. Ogden*, 9 Wheat. 1.

There is a line of cases determined by the Supreme Court of the United States, which hold that it is competent for the States, in the absence of legislation by Congress, to legislate respecting interstate commerce. But those cases have been such as relate to bridges or dams across streams wholly within a State, police laws, laws relating to pilots of vessels, health laws, and the like. See *Cooley v. Board of Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Wall. 713.

But that court has always held that the power to enact laws upon subjects in their nature national, and not merely local, is exclusively with Congress. In *Cooley v. Board of Wardens*, *supra*, it is said: "Whatever subjects of this power are in their nature national or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

That the act of this State, assuming that its object and purpose was to control and regulate the shipments of freight to other States is of the character last defined, appears to us to be very clear, and

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we are not without authority upon this question, and from a source which so far as questions involving the construction of the Federal Constitution are involved, are binding upon this court, and all other courts in the Union.

The legislature of the State of Pennsylvania enacted a law imposing a tax upon freight taken up within the State and carried out of it, or taken up without the State and carried within it. The Pennsylvania Railroad Company refused to pay the tax upon the ground that the law was unconstitutional and void, in conflict with the Constitution of the United States which ordains that "Congress shall have power to regulate commerce with foreign nations and among the several States." In the case of the *State Freight Tax*, 15 Wall. 232, involving the validity of this act, it was held that the tax imposed thereby was upon the freight carried, and that it was a regulation of inter-State transportation or commerce among the States. The court in that case says: "If then, this is a tax upon freight carried between States and a tax because of its transportation, and if such tax is in effect a regulation of inter-State commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States."

In *Henderson v. Mayor of New York*, 92 U. S. 272, the following language is used: "It is said however that under the decisions of this court there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the State, and its legislation be valid so long as it interferes with no act of Congress, or treaty of the United States. Such a proposition, is supported by the opinions of several of the judges in the *Passenger Cases*; by the decisions of this court in *Cooley v. Board of Wardens*, 12 How. 299; and by the cases of *Crandall v. Nevada*, 6 Wall. 35; and *Gilman v. Philadelphia*, 3 id. 713. But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions however all agree, that under the commerce clause of the Constitution, or within its compass, there are powers, which from their nature are exclusive in Congress; and in the case of *Cooley v. Board of Wardens*, it is said that whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

In the case of *Balt. & O. R. Co. v. Maryland*, 21 Wall. 456, it

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was determined that the charter of the Baltimore and Ohio Railroad Company for constructing and operating a branch railroad from Baltimore to Washington, upon a stipulation contained in the charter that the company should pay the State of Maryland one-fifth of the amount of money received for the transportation of passengers, was not an infraction of the Federal Constitution as being a regulation of inter-State commerce. It is there said: "The exercise of power on the part of the State is very different from the imposition of a tax or duty upon the movements or operations of commerce between the States. Such an imposition, whether relating to persons or goods, we have decided the States cannot make, because it would be a regulation of commerce between the States in a matter in which uniformity is essential to the rights of all, and therefore requiring the exclusive legislation of Congress."

In that case the State of Maryland in granting the charter especially reserved the right to part of the earnings of the road, and the power to do so was upheld upon the principle that if the State had itself built the road and operated it, it would have been entitled to its earnings.

The cases of *State v. Munn*, 94 U. S. 113; *Chic. etc., R. Co. v. Iowa*, id. 155; and *Peck v. C. & N. W. R. Co.*, id. 164, do not appear to us to sanction the validity of acts of the State legislature regulating the transportation of freight and passengers between the States. They merely determine the power of the States to fix reasonable warehouse charges, and reasonable charges for transportation of freight within the boundaries of the States respectively, and that when such power is exercised, although it may incidentally affect commerce between the States, yet the laws of the States are not regulations of inter-State commerce, because of such incidental results. That it was not intended in those cases to uphold legislation like that under consideration in this case it appears to us is conclusively shown by the reasoning in the later cases of *Hall v. De Cuir*, 95 U. S. 485, and *Han. etc., R. Co. v. Husen*, id. 465.

II. It is urged with great earnestness that these contracts of shipment are entire contracts, and having been entered into in Iowa, the laws of this State entered into and became a part of the contracts, and the statute fixing the rate governed the price for the entire distance. This rule is, no doubt, correct when applied to a valid enactment of the legislature of a State where a contract is entered into, and no one doubts the power of a common carrier to

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bind itself to ship freight beyond State lines or even to foreign countries and beyond the terminus of its line of transportation. Under such a contract it is everywhere held that the carrier is bound to perform his contract, and is liable for loss by negligence. But this position of counsel, it seems to us, begs the question, because if the law of Iowa under consideration is an unauthorized regulation of inter-State commerce it cannot enter into and become part of any contract. This position of counsel forcibly illustrates the correctness of our conclusion that the law in question, if held to have been intended to operate upon inter-State traffic, is directly and palpably contrary to the Constitution of the United States. If the law entered into and became part of the contract of shipment we should have a law of Iowa which would control and regulate the transportation of freight, not only to the remotest parts of the States and Territories of this country, but extending to all the nations of the earth to which lines of common carriers extend, and to which local carriers may undertake to transport goods. That such legislation is national in its character it seems to us must be conceded.

If we are correct in these views there is but little more necessary to be said in this case. The plaintiffs claim to recover because the amount of freight-money exacted by the defendant was in excess of the rate fixed by the law of Iowa. The contract of shipment was an entirety. It cannot be severed and made to apply partly to the shipment in Iowa and partly to that in Illinois. It was the right of the defendant to disregard any laws which sought to regulate shipments to points without the State, and make its own contracts. Having done so, the plaintiffs cannot recover under any State law, simply because it is void as being repugnant to the Federal Constitution. Whether the plaintiffs are entitled to any relief independent of the statute, we do not determine, because that question is not in this case.

Judgment affirmed.

BECK, J., dissenting.

NOTE BY THE REPORTER. In *People v. Wabash, etc., Ry. Co.*, 104 Ill. 476, the same question came up, and the opposite doctrine was held, the court observing: "But it is urged, if we are correct in the view that the law is broad enough to include unjust discrimination in the rates of charges for the transportation of property from a point within to a point without the State, then the statute is in conflict with section 8, article 1, of the Federal Constitution, which declares that Congress shall have the power 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' There is no doubt in regard to the right and the power of Congress to regulate commerce among the

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States, but a law of a State which may incidentally affect commerce among the States has never, so far as we are informed, been regarded as falling within the inhibition of the Federal Constitution. In *Hall v. De Cuir*, 95 U. S. 487, where this question was under discussion, it is said: 'There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States.' The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, 'legislation may, in a great variety of ways, affect commerce, and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution.'

"It is no doubt true that the statute to prevent unjust discrimination in the rates of charges of railroad companies, under which this action was brought, may affect commerce, but in our judgment it cannot be said to be a law regulating commerce among the States, within the meaning of the Federal Constitution. The law does not purport to exercise control over any railroad corporation except those that own or operate a railroad in the State, — such companies as have domestic relations with the people of the State, — and as we understand the decisions of the Supreme Court of the United States, similar laws enacted by State authority have been upheld and sustained, although such laws may affect commerce. *Peck v. Chicago and Northwestern Ry. Co.*, 94 U. S. 184, is a case in point. The chief justice, in delivering the opinion of the court, as respects the question involved, said: 'The suits present the single question of the power of the legislature of Wisconsin to provide, by law, for a maximum of charge to be made by the Chicago and Northwestern Railway Company for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside and carried without.' In regard to the act of the legislature being in conflict with the Constitution of the United States, the court said: 'As to the effect of the statute as a regulation of inter-State commerce, the law is confined to State commerce, or such inter-State commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-State commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally these may reach beyond the State. But certainly until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without.'

"A similar question arose in *Chicago, Burlington and Quincy R. R. Co. v. Iowa*, 94 U. S. 155, and it is there said: 'The objection that the statute complained of is void because it amounts to a regulation of commerce among the States has been sufficiently considered in the case of *Munn v. Illinois*. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as inter-State commerce, and until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.'

"But it is said the cases cited are not authority, as the question involved here did not, and could not, arise in those cases. In the *Peck* case one of the allegations of the bill upon which complainant relied to defeat the law of the State was, 'that the 18th section is a regulation of inter-State commerce;' and in the argument before the Supreme Court, one of the points relied upon, as shown in the statement of the case, was as follows: 'The act is a regulation of inter-State commerce, and for that reason unconstitutional.' In the other case (*Chicago, Burlington and Quincy R. Co. v. Iowa*) we find a similar allegation in the bill, and the same question raised in the argument. When a question is presented by a bill in equity, urged and relied upon in the argument, and passed upon by the court in the opinion, it cannot with reason be said that the point was not involved, and the opinion of the court on the question is *obiter*. The question was made by the pleadings, argued by counsel, and decided by the court. Under such circumstances we perceive no good reason why the decision of the court may not be relied upon as authority. The statute in question, as before observed, was not passed for the purpose, or with the view, of regulating commerce among the States — its object was to reach railroad companies which derived their power to transact business from this State — those that were organized under the laws of this

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State, and those that were organized in another State and doing business in this State. The regulation imposed by the statute is a matter of domestic concern, pertaining to the people of the State and the railroads of the State. The Wabash Railroad Company, which was sued in this case, is engaged in State as well as inter-State commerce, and as was said in the *Burlington* case, *supra*, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be incidentally affected. Should Congress, under the provision of the Constitution which authorizes the regulation of commerce among the States, pass a law regulating the charges of all railroads engaged in inter-State commerce, it may be that the law of this State might then be confined to charges for the transportation of property wholly within the State; but no such law has been passed, and that question does not arise here."

This ruling was explained by the same court, in the same case, 105 Ill. 226, as follows: "We see no reason to depart from the conclusion reached in this case when it was here before. See *People v. Wabash, St. Louis and Pacific Ry. Co.*, 104 Ill. 476. But to avoid misapprehension, we deem it advisable to state explicitly that we disclaim any idea that Illinois has authority to regulate commerce in any other State. We understand, and simply hold, that, in the absence of any thing showing to the contrary, a single and entire contract to carry, for a gross sum, from Gilman, in this State, to the city of New York, implies, necessarily, that that sum is charged proportionally for the carriage on every part of that distance, and that a single and entire contract to carry, for a gross sum, from Peoria, in this State, to the city of New York, implies the same thing; and that therefore, when it is shown that there is charged for carriage upon the same line, less from Peoria to New York (the greater distance) than from Gilman to New York (the less distance), and nothing is shown to the effect that such inequality in charge is all for carriage entirely beyond the limits of this State, a *prima facie* case is made out of unjust discrimination, under our statute, occurring within this State. We hold that the excess in the charge for the less distance presumably affects every part of the line of carriage between Gilman and the State line, proportionally with the balance of the line."

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(50 Iowa, 251.)

Constitutional law — separate taxation of corporate property and shares.

The legislature may authorize the taxation of a toll bridge against the corporation, and of the shares of the stock of the corporation against the stockholders.

A PPEAL from board of equalization of taxes. The opinion states the point.

Hedge and Blythe, Shiras, Van Duxee and Henderson for appellants.

C. L. Poor, for appellee.

ROTHROCK, J. The assessment of the bridge as the property of the corporation was authorized by law. *Appeal of Des Moines Water Company*, 48 Iowa, 324. Whether the shares of stock can be legally assessed and taxed as the property of the stockholders for the same year for which the property of the corporation is assessed and taxed was not determined in that case. It was said however that "the statute provides that the stock of such corporations shall be assessed at its cash value. When assessed and taxed under the statute, stock must be taxed as the property of the respective owners, and there is no provision making the corporation liable therefor."

We have then the question in this case whether the shares of stock may be taxed in addition to the taxation of the property of the corporation.

And we may say, once for all, at the outset, that our views, as expressed in the case just cited, that the statute provides that the stock shall be assessed and taxed, remains unchanged. This conclusion is not founded upon any doubtful construction of the statute, but upon its plain, certain and unequivocal language and meaning. The statute imposing this burden upon the stock is found in section 813 of the Code, and is as follows: "Depreciated bank notes and the stock of corporations and companies shall be assessed at their cash value, * * *."

It is idle to contend in the face of this plain and explicit language that the legislature has not required that stock in corporations shall be assessed, and the only question now for determination is, does the legislature have the power to determine that the property of a corporation and the stock shall both be taxed.

Counsel for appellants contend that no such power exists, because it is duplicate or double taxation of the same property, and it is insisted that "this court has over and over again declared that double taxation is forbidden by our Constitution." If this statement were correct, and we should concede that the question here presented were one of duplicate taxation, the case could easily and speedily be disposed of by a prompt reversal. But while it is true that this court in *Tullman v. Butler County*, 12 Iowa, 534, said that it "is neither the policy nor the justice of the law to tolerate double taxation," and in *U. S. Express Co. v. Ellyson*, 28 id. 378, that "double taxation would be so unjust as to excite disfavor of both courts and legislature," and in *McGregor's Ex'rs v. Vampel*, 24 id.

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436, that mortgages upon real estate should be held to be taxable "unless this will lead to double taxation," yet it never has been held in this State, that what is denominated duplicate taxation is in excess of the legislative power. The most that can be said of these utterances of this court is, that it should be held in disfavor by courts and legislatures.

In *Cooley on Taxation*, 165, it is said: "It has properly and justly been held that a construction of the laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute or by necessary implication."

Upon the question as to whether the imposition of taxes upon the property of a corporation and upon the shares of stock in the hands of stockholders, the general observations upon the subject of duplicate taxation found in *Cooley on Taxation*, page 159, seem to us to be appropriate to be here quoted. It is there said: "A system of indirect taxes, combined with a system of general taxation by value, must often have the effect to duplicate the burden upon some species of property or upon some persons, and the taxation of stockholders of a corporation and also of the corporation itself, must sometimes produce a like result. There is also sometimes what seems to be double taxation of the same property to two individuals, as where the purchaser of property on credit is taxed on its full value while the seller is taxed to the same amount on the debt. * * * Now whether there is injustice in the taxation, in every instance in which it can be shown that one individual, who has been directly taxed his due proportion, is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results."

It must be conceded that the taxation of the property of the corporation and also of the stock bears no resemblance to taxing the same tract of land twice to the same person, nor once to A. and again to B. That would be a double taxation, which we suppose would not be allowable in any State in the Union. It would be a direct discrimination and inequality in the exercise of the taxing power, which would impose a greater burden upon one citizen than upon another upon the same kind of property. But the case at bar is quite different. The corporation is a person distinct from the

stockholder. It is true, it is what is denominated an artificial person, and may be said to be ideal and intangible. But that it is a person in law is the first principle learned by the student in opening any book on corporations. Its stockholders are distinct and different persons. They are usually not liable for its debts, and have no right to the enjoyment or possession of its property during the period of its duration or until it be dissolved by some procedure known to the law. The stockholder is entitled to dividends upon his stock, if there be any dividends, and the value of his stock depends upon prospective dividends, and the dividends depend upon the net earnings of the corporation. If the bridge in this case be taxed, the tax must be paid from the income, and this reduces the value of the stock, so that there is no duplicate taxation, so far at least as the tax upon the bridge reduces the value of the stock.

In *McGregor's Exors v. Vampel, supra*, this court held that a mortgage given to secure the payment of the purchase-money of the premises mortgaged is not exempt from taxation. In that case it is said that "a system of assessments operating with entire equality and with absolute justice is a *desideratum* in government yet unattained, and perhaps unattainable." And in *Finley v. Philadelphia*, 32 Penn. St. 381, it is said: "There is nothing poetical about tax laws, whenever they find property they claim contribution for its protection without any special respect to the owner or his occupation."

The best devised system of taxation based upon the values of property must of necessity produce unequal results, so long as the attempt is made to tax all property including real estate, personal chattels, and moneys and credits. One person will be taxed upon the real estate bought upon credit, and another upon the obligation which he holds for the purchase-money. And this must necessarily be so or there would be but little taxation upon credits, because for the most part, they are either the representative of money or property of some kind held by another. If as is said in Cooley on Taxation, 100, "all the property in a town is sold on credit and the property is taxed to the purchasers, and the debts to sellers, it is manifest that the town taxes twice as much wealth as lies within its borders." And yet under the system of taxation adopted by the State of Iowa, it cannot be claimed that the assessor must inquire of the owner of promissory notes, or mortgages,

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whether they are credits for taxable property which has been sold by the holder of these credits.

In the case at bar the stockholders paid to the corporation a certain sum of money. The corporation used this money in the construction of a toll-bridge from which the corporation derived an income. The agreement between the contracting parties is that the corporation is to manage and control the bridge, make the necessary repairs, and pay the taxes assessed against the bridge, and after deducting these legitimate and necessary expenses pay to the stockholder his proportionate share of the net earnings, and upon the dissolution of the corporation the stockholder is to be repaid his money advanced from the property belonging to the dead corporation. Now suppose this very contract were made with a natural person instead of a corporation, and the stockholder or creditor should make a claim that the obligation held by him was not taxable. There would be no more grounds for such claim under our system of taxation than there would be for the claim that if A. loans B. \$100, which is invested in merchandise, the debt is not taxable because the merchandise is taxable.

These illustrations, it appears to us, demonstrate that if we were to determine that the legislature has no constitutional power to impose this tax upon the stockholder, it would open a door into a sea of trouble in the administration of the revenue laws of the State.

In disposing of this important question we have not reviewed the authorities cited by the respective counsel of the parties. It is sufficient to say that these views are supported by the very great majority of adjudged cases upon this subject. We think the Circuit Court correctly determined that the shares of stock are taxable. And if the public interests of this State require that either the property of a corporation of this character, or the stock therein be exempt from taxation, that relief must come from the law-making power. It will be understood that the decision in this case will have no application to capital stock in manufacturing companies. By chapter 57 of the laws of 1880 such stock is exempt from assessment and taxation.

Affirmed.

ADAMS, J. I concur in the result reached in this case, but not in the ground upon which it is reached. The general question de-

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cided by the majority, while it is the only question argued by counsel, does not, it appears to me, properly arise from the record, and could not properly have been decided by the court below.

The appellants, in maintaining that the stock is not liable to taxation, contend that it is not for the reason that the property of the corporation had been taxed to the corporation in Iowa, and that the taxation of the stock under the same sovereignty would be double taxation, and not allowable. The majority hold that such taxation would not be double taxation in such sense that it is not allowable. Upon this question I do not feel called upon to express any opinion. A part of the bridge is in the State of Illinois and not taxable in Iowa. *Dunleith & Dubuque Bridge Co. v. Dubuque County*, 55 Iowa. 564. It is true one witness testified that "the taxes on the bridge had been assessed at Dubuque and paid in Dubuque county." But I cannot presume that the witness meant that any more of the bridge was taxed at Dubuque than was taxable there. Besides if taxes had been collected in Dubuque county upon Illinois property, it would be by reason of a mistake, which would be subject to rectification.

We have then a case where a portion only of the property of a corporation is shown to have been taxed to the corporation. This is not sufficient to justify us in holding that the stock is wholly exempt as appellants contend. The court below very properly held that the stock upon the showing made was not wholly exempt. No mere reduction of assessment was asked, and no allusion appears to have been made to such a question. The ruling then could not properly have been different if it should be conceded that where all the property of an Iowa corporation is in Iowa and has been taxed in Iowa, the stock of such corporation would be exempt.

WOODBURY v. ROBERTS.

(95 Iowa, 248.)

• *Negotiable instrument — uncertainty of time of payment.*

A promissory note providing that the payee (maker) or his assigns may extend the time of payment indefinitely is not negotiable.*

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

Newman & Hake, for appellants.

Whiffin & Brown, for appellee.

BECK, J. The only question in the case involves the negotiability of the note in suit, of which the following is a copy :

"\$300. DALLAS TOWNSHIP, IOWA, March 18, 1880.

"Three months after date, I promise to pay to the order of Warren Roberts three hundred dollars, at the first National Bank of Burlington, Iowa, value received, with interest at ten per cent per annum, including attorney's fees and all costs of collection."

"The makers and indorsers of this obligation further expressly agree that the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely as he or they may see fit." (Signed) "WARREN ROBERTS."

"Indorsed on the back, WARREN ROBERTS."

When an instrument is not certain, or is not capable of being made certain, as to the time of payment, the law does not regard it as negotiable paper. By the terms of the condition of the note in suit it would never fall due, but could be indefinitely extended at the will of the maker and indorser, who, it will be observed, is the same party. When the instrument was executed the time of its maturity was contingent upon the option of the maker of the note. It was impossible to determine when it would become due by the assent of the maker. The time of payment was uncertain and was not capable of being made certain. Nothing happened after its execution to remove this uncertainty.

Notes, which by their terms are payable on or before a fixed time or a specified event, are, it is true, uncertain as to the time at which they are payable. But there is no uncertainty as to the time when they become absolutely due. Paper of this character is regarded by the courts as negotiable. But the note before us may never fall due, for payment may be extended indefinitely.

The rules applicable to commercial paper were transplanted into the common law from the law merchant. They had their origin in the customs and course of business of merchants and bankers, and are now recognized by the courts because they are demanded by the wants and convenience of the mercantile world. Surely these rules ought not to be extended to paper, the like of which was never heard of in mercantile transactions. What business man would expect a banker to discount his paper in the form of the note in question in this case? What merchant ever offered to give or was asked to receive a promissory note containing a like condition? We may safely say that notes of this kind are unknown to commercial transactions. Why then extend to them the rules of the commercial law?

By regarding such paper as non-negotiable no prejudice will result to the mercantile and financial business of the country, but sharpers will be defeated in their attempts to swindle the confiding and unwary, a result in accord with sound public policy and good morals.

Miller v. Poage, 56 Iowa, 96; s. c., 41 Am. Rep. 82; *Smith v. Van Blarcom*, 45 Mich. 471, support the conclusions we have reached that the note in suit is not negotiable. The case last named holds a note to be non-negotiable which contains the precise condition found in the note before us.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

STATE V. CONNOR.

(59 Iowa, 357.)

Criminal law — assault with intent to commit manslaughter.

There may be an assault with intent to commit manslaughter.

CONVICTION of assault with intent to commit manslaughter.
The opinion states the case.

Marion v. Chicago, Rock Island and Pacific Railroad Company.

H. B. & L. C. Hendershot, for appellant.

Smith McPherson, Attorney-General, for State.

ADAMS, J. I. The court gave an instruction in these words :
“ If you find from the evidence that the defendant, at the time and place charged in the indictment, unlawfully assaulted said Ryan with a pistol and shot him in the breast, and you further find that said assault was made upon reasonable provocation in the heat of blood, but without malice, and without legal excuse, and with the intent to kill, then you would be justified in finding the defendant guilty of an assault with intent to commit manslaughter.” The giving of this instruction is assigned as error.

The question presented received a very careful consideration in *State v. White*, 41 Iowa, 325 ; s. c., 20 Am. Rep., 602. Without claiming that the decisions are uniform, or that the objections urged by the learned counsel for the appellant are without weight, we have to say that we see no sufficient reason for departing from the rule adopted ; and the instruction must be approved.

[Omitting other points.]

We see no error in the rulings of the court, and the judgment must be affirmed.

Judgment affirmed.

MARION V. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO.

(50 Iowa, 428.)

Master and servant — course of employment.

SUFFICIENTLY reported, 42 Am. Rep. 36.

HOLLEN V. DAVIS.

(59 Iowa, 444.)

Negotiable instrument — note not stating amount except in marginal figure.

There can be no recovery at law upon an instrument in the form of a promissory note, but stating no amount in the body of the note, although figures are set forth in the margin. (*See note, p. 690.*)

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Stivers & Louthan and C. B. Bradshaw, for appellants.

Struble & Kinne and O. H. Mills, for appellee.

BECK, J. I. This action was brought before a justice of the peace upon a promissory note indorsed to plaintiff in the following form and language :

“\$200.

TAMA CITY, IOWA, July 27, 1875.

“Fifteen months after date I promise to pay to the order of Richard Thomas, and in case of his death to J. D. Merritt, dollars, at the Banking House of Carmichael, Brooks & Co. for value received, with interest at ten per cent per annum.

“FRED. T. DAVIS.

“Due October 27, 1876.

The defendant Davis, the maker of the note, accepted service of the notice of the action before the justice, and assented “that the justice have jurisdiction to try the suit to the amount of two hundred and fifty dollars.”

The defendant failed to appear to the action before the justice and judgment was rendered against him by default for two hundred and fifty dollars and costs. From this judgment defendant appealed to the Circuit Court.

By leave of the Circuit Court, defendant filed an answer and counter-claim, and afterwards plaintiff, by leave of the court, filed

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what is called an amended petition, setting out the note and showing that it was transferred to plaintiff who is now the holder thereof, and alleging that the amount for which the note was intended to be executed, two hundred dollars, is not expressed in the body of the note, being omitted through mistake in failing to fill up the blank, and that it was the mutual agreement and understanding of the parties that the note should be so written as to express the agreement to pay two hundred dollars. The amended petition prays that the note may be reformed and corrected by inserting the words "two hundred" in the body of the note in the proper blank, and that judgment for the sum of \$350 be rendered in this case.

A motion to strike the amended petition, on the ground that it presents a cause of action in equity, and no such claim was made before the justice, was sustained. Thereupon the cause came on for trial and plaintiff offered the note in evidence. Objection thereto on the ground that the instrument is not a promissory note, is not described in the notice of the action of the justice's court, and does not contain a promise to pay any sum of money, was overruled, and the note was admitted. The defendant thereupon withdrew his counter-claim.

The plaintiff testified, in substance, it was the intention of the parties that the note should call for \$200, and the proper words expressing that amount were not written through oversight and mistake. This evidence was objected to by defendant. The plaintiff was permitted to file an amended petition which is in the same language as the amended petition stricken from the files. To the filing of the pleading objection was made on the ground that it introduces a new demand in the action which is exclusively cognizable in a court of equity. The objections were overruled and the cause was continued at the cost of defendants. At the next term the defendants moved to strike the amended petition for substantially the same reasons that were assigned as objection to filing it. The motion was overruled. Upon evidence showing it was the intention of the parties that the note should call for \$200, judgment was entered reforming it to correspond with such intention, and judgment was rendered against defendant and his sureties upon the appeal bond for \$327.38. The sureties upon the appeal bond unite with defendant in the appeal.

II. The figures in the margin of the note in the suit are no part

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of the instrument; they constitute a mere memorandum. They cannot supply the blank for insertion of the amount the maker agreed to pay. *Norwich Bank v. Hyde*, 13 Conn. 297; *Smith v. Smith*, 1 R. I. 398.

It follows that there can be no recovery upon the note, for it is not a promise to pay any sum. This conclusion seemed to have been reached at the trial in the court below, for recovery was only had after judgment reforming the instrument and filling the blank in accord with the intention of the parties as shown by the evidence.

III. We are required to determine whether the Circuit Court was authorized to enter the decree reforming the note.

[Omitting this question.]

We reach the conclusion that the Circuit Court erred in reforming the note and rendering judgment thereon.

Reversed.

NOTE BY THE REPORTER.—In *Garrard v. Lewis*, Q. B. Div., 47 L. T. Rep., N. S. 408, a bill of exchange which contained the sum of £14 in figures in the margin, but no words in the body to denote the amount, was accepted by the defendant and returned to the drawer to be filled in. The drawer fraudulently inserted the words "One hundred and sixty-four" in the body, and altered the marginal figures to that amount and issued the bill. Held, that the defendant was liable on the bill to the plaintiff, an innocent holder for value. The figures in the margin of a bill are merely an index or summary of the contents of the bill. "From the view I take of this case it is unnecessary for me to examine or refer to the series of cases cited before me, beginning with *Young v. Grote*, 4 Bing. 253; which deal with the question of negligence as applied to negotiable instruments. It is however necessary that I should state what in my view was the character of the document when handed by the defendant in blank to Bees, and for this purpose to consider what is the exact import and effect of marginal figures at the head of a bill of exchange. They do not seem in general to have been considered among merchants as one of the same effect and value as the mention of the sum contained in the body of the bill. The history of these marginal figures may perhaps be shortly summarised as follows: The first model of a bill of exchange preserved to us, and which dates from 1381, does not I believe possess them, though it does not possess the votum or invocation with which merchants' bills used generally to commence, and which usually preceded the figures. The marginal figures at the head of a bill, which have since become a matter of common usage, were probably added at a very early date, in order that the amount of the bill might strike the eye immediately, and were in fact a note, index, or summary of the contents of the bill which followed: (see Nougier, *Lettres de Change*, edit. 1875, p. 157, 'Les chiffres ne sont que pour simple note.') Heinemann, who treats such marginal figures as part of the lemma or heading, does not speak of them as an essential part of the bill, and the fact that by the law of some countries the amount of the bill was necessarily repeated, both in figures and in words, is adduced by him as a reason for this view (edit. A. D. 1709, cap. iv. s. 5; see also cap. iv. s. 12): 'Denique sollemne etiam est campsoribus, sub finem lemmatis cifris exprimere summam soluendam, addito monetæ genere, quo exactori sit satis faciendum; quamvis hoc requisitum vel ideo, essentielle dici nequeat, quod summa in ipsis litteris cambialibus bis exprima solet.' Hoc requisitum non esse essentielle vel inde patet, quod ipse acceptans hanc summam supplere potest, quum tamen debitor sine falsi crimine in ipsi obligatione nihil mutare possit. Aducitur ergo summa magis notitia, quam necessitatis causa.' Marius, the first English writer on the subject (2d edit. A. D. 1655, p. 34) in explaining that the words in the body are in case of difference to govern,

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adds : 'The figures at the top of the bill do only, as it were, serve as the contents of the bill and a *breviat* thereof, but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof whereto special regard ought to be had.' The substance of this passage is reproduced by Beames, § 103. Story (Bills of Exchange, § 42) deals with the matter as follows : 'The sum is sometimes also expressed in figures in the superscription as well as in the body of the instrument in letters, for greater caution. But if the sum in figures on the superscription differs from the sum in words in the body of the instrument, the letters will be deemed to be the sum.' This view has received judicial sanction in the case of *Sanderson v. Piper*, 5 Bing. N. C. 431, where a bill containing £245 as a marginal figure, but two hundred pounds in the body of the will in words was held to be a bill for the latter sum. The case of *Rex v. Elliott*, 1 Leach, C. C. 175, is distinguished and explained by TINDAL, C. J., in *Sanderson v. Piper*. Let us now apply the above proposition to the case of a document like the present, signed originally in blank with a marginal figure or index, which has since been improperly altered. A document which contains such a marginal index, but in which a blank is left by the acceptor to be filled in with the dominant and all important statement in the body of the bill defining the amount for which it is accepted, is not a perfect bill till this dominant portion of the bill has been filled in. The document is not invalid simply because it is incomplete. It creates certain rights and obligations just as a blank acceptance does. But as the blank is presumably intended to be filled with something, the document till this 'something' has been added is not complete. Nor is the question merely what is the actual limit of authority conferred by the acceptance in blank of such a document on the person to whom the acceptor hands it, but rather, what authority the acceptor by his conduct holds out that person as possessing when the bill has reached the hands of innocent holders who do not know that the actual authority conferred is a limited one only. Let me assume first a case in which no marginal figure exists at all, but in which a blank acceptance is left to be filled in, but which is subsequently filled in with a sum in the body of the bill, larger than that which the acceptor has actually directed. It is plain, I think, that in the hands of a *bona fide* holder for value without notice, a bill so filled in binds the acceptor to the full amount. Next, let me assume a case of a similar excess of authority, where however a marginal index exists on the bill for a smaller sum than that which has been subsequently placed in the body of the bill. Is the apparent and ostensible authority of the drawer to whom the acceptance was intrusted in blank necessarily limited by the figure in the margin, when the holder of the bill is acting innocently and in good faith ? I think not. For it is conceivable that after the bill was signed in its original form the acceptor may have changed his mind and authorized the drawer to disregard the index and to fill in the body of the bill with larger amount. If the acceptor had in fact authorized this to be done, surely he could not as against a subsequent holder deny that the bill for the larger amount so inserted by his express direction was his bill simply because the marginal figures have been left unchanged. *Sanderson v. Piper* seems to show this much at all events. Yet if the holder in the absence of notice would have a right to neglect the marginal figure if it remained unaltered, and to look only to the body of the bill, it would seem next to follow that even if the marginal figure was altered, the holder would have a right in the absence of notice to assume it was altered properly. The holder's right to look to the body of the bill would not be affected by such alteration, if he did not know the alteration was improper. *A fortiori*, his right to look to the body of the bill would remain the same when he did not know the marginal figure had undergone any alteration at all. Thus I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is intrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp, and that no alteration (even if it be fraudulent and unauthorized) of the marginal figure vitiates the bill as a bill for the full amount inserted in the body, when the bill reaches the hands of a holder who is unaware that the marginal index has been improperly altered."

HUDSON V. CHICAGO AND NORTH-WESTERN RAILROAD COMPANY.

(59 Iowa, 561.)

Evidence — of former accidents and subsequent repairs, in action of negligence.

In an action against a railway company for an injury to a horse at a defective highway crossing, evidence of former similar accidents at the same place is inadmissible; and so of evidence that after the accident the company repaired the defect. (*See note, p. 694.*)

ACTION of damages for injury to a horse at a railroad and highway crossing. The opinion states the point. The plaintiff had judgment below.

Hubbard, Clark & Dawley, for appellant.

Sutton & Childs, for appellee.

ROTHROCK, J. [Omitting other matters.] Plaintiff introduced a witness who testified, that some six months before the accident complained of, a horse driven by him over the crossing in question got his foot between the plank and the rail at the same place where plaintiff's horse was injured. The defendant objected to this testimony as incompetent. The objection was overruled and an exception taken. Upon this point in the case the Circuit Court certified the following question: "Ought the court to have admitted evidence of former accidents at the same place to parties other than the plaintiff?"

In *Collins v. Inhabitants of Dorchester*, 6 Cush. 396, the plaintiff was injured by driving against a post in a highway. He sought to prove that another person had met with precisely the same kind of accident before, at the same place, and from the same cause. In determining the question the court said: "The testimony of Sprague that he, before the injury complained of by the plaintiff, received a similar injury at or near the same place, without any negligence on his part, was not competent for the purpose of proving that the road was defective at the time and in the place of the plaintiff's injury. It was testimony concerning collateral facts which furnish no legal presumption as to the principal facts in dispute, and which defendants were not bound to be prepared to meet. 2 Stark. Ev. 381; 1 Greenl. Ev., § 52."

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Parker v. Portland Publishing Co., 69 Me. 173; s. c., 31 Am. Rep. 262, was an action to recover damages for negligence in not properly lighting a passage-way. Evidence was received tending to show at different times the condition of the hallway and the entrance to the rooms of the building as to light—whether more or less or none—and of what had happened to other men at other times, and of their fortunate escape from peril. The court, APPLETON, J., said: "These facts were all collateral to the main issue, and should have been excluded." Citing 1 Greenl. on Ev., § 52. It was further said: "If evidence of this character is receivable, contradictory proofs would be admissible, and there would be as many collateral issues as there were collateral facts and witnesses testifying to them." It was held that allowing such evidence to be introduced was against the entire weight of judicial authority; citing *Hubbard v. R. R.*, 39 Me. 506; *Aldrich v. Pelham*, 1 Gray, 510; *Kidder v. Dunstable*, 11 id. 342; and other cases.

In *Blair v. Pelham*, 118 Mass. 420, an action for a personal injury caused by a defect in a highway, it was held that what happened at the same place a year before was rightly rejected.

A different rule was announced in the case of *Kelley v. Southern Minn. R. Co.*, 28 Minn. 98. But it appears in that case that the testimony objected to showed that the accident to which it related "was produced by a different cause, and at a point in the crossing about the condition of which there was no complaint," and the court held that the defendant, if it deemed the evidence prejudicial, should have moved to have it stricken out. The rule as stated in the opinion in that case is not discussed, and no authority is given in its support.

We think, both upon principle and authority, the evidence in question was improperly admitted, and that the question certified must be answered in the negative.

Testimony was received over defendant's objection to the effect that a day or two after the accident of which plaintiff complains, the employees of the defendant were at work at the crossing, "lifting the planks and making them different," and a witness stated that the plank where the accident happened "looked to be closer" to the rail after than before the repairs were made. The court certified this question upon that subject: "Did the court err in admitting testimony to show that the crossing had been changed and repaired after the accident?"

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We are clearly of the opinion that this question should be answered in the affirmative. The evidence could have been introduced and used before the jury for no other purpose than as an admission upon the part of the defendant that it had been negligent in keeping the crossing in proper repair prior to and up to the time of the accident. The admission of this evidence is in direct conflict with the case of *Cramer v. City of Burlington*, 45 Iowa, 627. It is in principle contrary to the well-established doctrine, that an admission made by an employee or agent, after the transaction, cannot be introduced as evidence against his principal. See *Sweetland v. Ill. & Miss. Tel. Co.*, 27 id. 433. To render such admission competent, it must be shown that it was both within the scope of the agency or employment, and made during the continuance of it in respect to the transaction then depending, or in case of a corporation or company, the admission must be made by one having authority to bind the company.

Appellee cites several adjudged cases which hold that evidence of such repairs may be shown. Whatever the rule may be in other jurisdictions, we regard it as settled in this State, and see no reason to make it otherwise, believing that it is correct in principle. There are other questions certified which we need not set out or discuss. They are in substance embraced in those above determined. The judgment of the Circuit Court will be reversed, and the cause remanded for a new trial.

Judgment reversed.

NOTE BY THE REPORTER. — The contrary doctrine on the first point involved in this case was held in *District of Columbia v. Armes*, 107 U. S. 519. The court said: "On the trial, a member of the metropolitan police, who saw the deceased fall on the sidewalk and went to his assistance, was asked, after testifying to the accident, whether while he was on his beat, other accidents had happened at that place. The court allowed the question against the objection of the city's counsel, for the purpose of showing the condition of the street, and the liability of other persons to fall there. The witness answered that he had seen persons stumble over there. He remembered sending home in a hack a woman who had fallen there, and had seen as many as five persons fall there."

"The admission of this testimony is now urged as error, the point of the objection being that it tended to introduce collateral issues and thus mislead the jury from the matter directly in controversy. Were such the case the objection would be tenable, but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received, no point was made upon them, no recovery was sought by reason of them, nor any increase of damages. They were proved simply as circumstances, which with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character — at least it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which the attention of the defendant was called by the nature of the action and the pleadings, and he should have

Hudson v. Chicago and North-western Railroad Company.

been prepared to show its real character in the face of any proof bearing on that subject.

"Those accidents also tended to show that the dangerous character of the locality was a matter likely to be brought to the attention of the city authorities

"In *Quinlan v. City of Utica*, 11 Hun, 217, which was before the Supreme Court of New York, in an action to recover damages for injuries sustained by the plaintiff through the neglect of the city to repair its sidewalk, he was allowed to show that while it was out of repair other persons had slipped and fallen on the walk where he was injured. It objected that the testimony presented new issues which the defendant could not be prepared to meet, but the court said: 'In one sense every item of testimony material to the main issue introduces a new issue; that is to say, it calls for a reply. In no other sense did the testimony in question make a new issue. Its only importance was that it bore upon the main issue, and all legitimate testimony bearing upon that issue the defendant was required to be prepared for.' This case was affirmed by the Court of Appeals of New York, all the judges concurring, except one, who was absent. 74 N. Y. 603.

"In an action against the city of Chicago, to recover damages resulting from the death of a person who in the night stepped off an approach to a bridge while it was swinging around to enable a vessel to pass, and was drowned—it being alleged that the accident happened by reason of the neglect of the city to supply sufficient lights to enable persons to avoid such dangers, the Supreme Court of Illinois held that it was competent for the plaintiff to prove that another person had under the same circumstances met with a similar accident. *City of Chicago v. Powers*, 42 Ill. 168. To the objection that the evidence was inadmissible, the court said: 'The action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate at the same place and from a like cause, it would tend to show a knowledge on the part of the city that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide proper means for the protection of persons crossing on the bridge. As it tended to prove this fact it was admissible; and if the appellants had desired to guard against its improper application by the jury they should have asked an instruction limiting it to its legitimate purpose.'

"Other cases to the same general purport might be cited. See *Augusta v. Hafers*, 61 Ga. 48; s. c., 34 Am. Rep. 95; *House v. Metcalf*, 37 Conn. 630; *Calkins v. Hartford*, 33 id. 57; *Darling v. Westmoreland*, 52 N. H. 401; 13 Am. Rep. 55; *Hill v. Portland and Rochester R. Co.*, 55 Me. 439; *Kent v. Lincoln*, 32 Vt. 501; *City of Delph v. Lowery*, 74 Ind. 580; s. c., 39 Am. Rep. 98. The above however are sufficient to sustain the action of the court below in admitting the testimony to which objection was taken."

Mr. Thompson says (Nex. 801): "The courts are divided upon the question whether it is competent for the plaintiff to show that other accidents of a similar character had happened at the same place. Evidence of the effect on other carriages driven over the same road, by other persons than the plaintiff, is supposed to have a tendency to show the fitness or unfitness of the road for public travel, and has been therefore held relevant; and this is so whether such carriages were like that driven by the plaintiff or not, and notwithstanding no evidence be given as to the rate of speed or degree of care with which they were driven. *Kent v. Lincoln*, 32 Vt. 501. So where the action was for an injury occasioned by a defective sidewalk, evidence was held properly admitted that other persons had slipped and fallen on the same sidewalk; for this tended to show that the sidewalk, tested by actual use, was in an unsafe condition at the time of the accident. *Quinlan v. Utica*, 11 Hun, 217. In Massachusetts this doctrine is denied. There it has been held inadmissible to permit a witness to state that before the happening to the plaintiff, he had received a similar injury at the same place. This was held to be testimony as to a collateral fact, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet. *Collins v. Dorchester*, 6 Cush. 397. So evidence that other vehicles had passed each other at the same place without accident, was held inadmissible to show that the way was not defective in point of width. *Aurich v. Pelham*, 1 Gray, 510. In an action against an overseer of highways for an injury growing out of the defective manner in which the highway was constructed, it is not competent to prove that other accidents of the same kind had taken place on the same place, for this would involve an inquiry as to the circumstances under which such accidents took place, and this would open up too extensive a field of inquiry.

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Sherman v. Kortright, 38 Barb. 227. Where the highway exhibited the same features for a considerable distance, evidence of a similar accident will not be rejected simply because it took place fifteen or twenty feet from the place where the accident happened to the plaintiff. *Bailey v. Trumbull*, 21 Conn. 500. Evidence that another person had fallen through the same drawbridge is held admissible in Illinois. *Chicago v. Powers*, 48 Ill. 102."

GREEN V. WILDING.

(28 Iowa, 679.)

Infancy — when contract void or voidable.

When the court can pronounce the contract of an infant to be to his prejudice, it is void, and when to his benefit, as for necessities, it is good; and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant; but that election must be exercised within a reasonable time after attaining majority. (*See note, p. 698.*)

ACTION to compel reconveyance of land. The opinion states the facts. The defendant had judgment below.

Ament & Simms, for appellant.

Wright & Baldwin, for appellee.

DAY, J. In 1869, one C. H. Barton died, seized of the land in question, leaving his widow, Rebecca Barton, and his children, Charles B. Barton, and the plaintiff his sole legal heirs. On the 19th day of February, 1872, Rebecca, Ida and Charles Barton, for the consideration of \$800, conveyed the land in controversy, to the defendant. At the time of this conveyance the plaintiff was thirteen or fourteen years of age, and Charles Barton was younger. No order of court was obtained appointing a guardian of the minors, or directing the sale of the real estate in question. The purchase was made by the defendant at the urgent solicitation of Rebecca Barton, and upon her representation that she could not otherwise maintain, educate and clothe her children. It does not appear but that the price paid was the full value of the land at the time of the purchase. The purchase price was paid to Rebecca Barton. The plaintiff lived with her mother until her marriage in September.

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1877. The plaintiff was born in March, 1858, or 1859. This action was commenced on the 14th day of November, 1880, when the plaintiff was either twenty-one years and eight months, or twenty-two years and eight months of age. She assigns as a reason why she did not commence the action sooner, that she was advised by her neighbors, and her mother, that she could not bring the action until her brother, who is still a minor, became of age. It does not appear that she applied for, or received, any legal advice upon the subject. She commenced the action about three months after she was advised by one McCoid, that she could do so.

I. It is insisted that the plaintiff's deed was without consideration, and is therefore void. The consideration was paid to the plaintiff's mother, and it is not shown to have been inadequate. The plaintiff resided with her mother until her marriage, and it does not appear but that she received the full benefit of the consideration in her support and education. The rule respecting the contract of an infant is as follows: "That when the court can pronounce the contract to be to the infant's prejudice, it is void, and when to his benefit, as for necessities, it is good; and when the contract is of an uncertain nature, as to benefit or prejudice, it is voidable only, at the election of the infant." *Keane v. Baysott*, 2 H. Bl. 511; 2 Kent Com. 193; *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251. The case of *Swafford v. Ferguson*, 3 Lea, 292; s. c., 41 Am. Rep. 639, cited and relied upon by appellant, is one in which there was no consideration whatever for the conveyance of the infant. The conveyance in this case, in our opinion, was not void, but voidable, at the election of the plaintiff within a reasonable time after attaining her majority. See Code, § 2238.

II. The only act of disaffirmance which the plaintiff did in the case was the commencement of this suit, which was either four years and eight months or three years and eight months after she attained her majority. In *Wright v. Germain*, 21 Iowa, 585, it was held that an act of disaffirmance about two years after the plaintiff attained majority was too late, although during the last year of that time he had been in the military service of the United States. In *Jones v. Jones*, 46 id. 466, it was held that an act of disaffirmance about six months after attaining majority was not, under the circumstances, within a reasonable time. What is a reasonable time within the meaning of the statute depends upon the circumstances of each case. *Jenkins v. Jenkins*, 12 id. 195.

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In this case the only excuse offered for the great delay is that the plaintiff was informed by her mother and neighbors that she could not disaffirm the contract until her brother became of age. She however did not take legal advice, and she waited at least three months after she was informed that she could disaffirm the contract, before she commenced the action. In our opinion the plaintiff's act of disaffirmance was not within a reasonable time. The judgment is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — The modern doctrine generally prevailing is that all an infant's contracts, except those for necessities and those void as between adults, are only voidable. See *Harner v. Dipple*, 31 Ohio St. 72; 27 Am. Rep. 426; *Owen v. Long*, 115 Mass. 408; *Williams v. Moor*, 11 M. & W. 266; *Touch v. Parsons*, 3 Barrow, 1794; *Whitney v. Dutch*, 14 Mass. 457; *Reed v. Batchelder*, 1 Metc. 559; *Curtin v. Patton*, 11 S. & E. 305; *Hinley v. Margaritis*, 3 Barr. 428; *Patchin v. Cromack*, 13 Vt. 330; *Vaughn v. Parr*, 20 Ark. 600; *Shropshire v. Burns*, 46 Ala. 106; *Petrow v. Wiseman*, 40 Ind. 148; *Fonda v. Van Horne*, 15 Wend. 631; 30 Am. Dec. 77; *Scott v. Buchanan*, 11 Humph. 466; *Cole v. Pennoyer*, 14 Ill. 158; *Oummings v. Powell*, 8 Tex. 80; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; *Mustard v. Wohlford*, 15 Gratt. 339; *Williams v. Moor*, 11 M. & W. 266.

CASES

IN THE

COURT OF APPEALS

OF

TEXAS.

LA NORRIS V. STATE.

(13 Tex. Ct. App. 33.)

Criminal law — occupation tax — illegal sale of intoxicants.

The conductor of a Pullman palace car, licensed as a hotel car, retailed intoxicating drinks to passengers at a bar in the car. The occupation tax levied upon retail dealers in spirituous liquors had not been paid by himself or the car company. *Held*, that he was liable to the penalty provided for violation of the occupation tax law.

CONVICTION of selling spirituous liquors without having paid the occupation tax. The opinion states the case.

Foster & Wilkinson, for appellant.

H. Chilton, assistant attorney-general, for State.

WILLSON, J. Article 110 of the Penal Code provides as follows: "Any person who shall pursue or follow any occupation, calling, or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum."

The act of March 11, 1881 (Acts Seventeenth Legislature, ch. 34, p. 21), imposes upon persons engaged in the business of selling spirituous liquors in quantities less than one quart, an annual tax of \$300, and empowers the commissioners' court of each county to levy and collect from such persons one-half the amount of the tax levied by the State. Sections 1 and 2 of the act.

The defendant was prosecuted for a violation of article 110 of the Penal Code, above quoted, and was convicted and fined \$450. It was proved that he was an employee of the Pullman Palace Car Company; that he had charge of a palace car belonging to the company, which car was used for transporting passengers over the line of railroad, and in this car such passengers were furnished with sleeping accommodations, and with food and drink. In this car there was a small bar supplied with spirituous liquors, and such liquors were sold from this bar to passengers calling for them. The defendant sold two drinks from this bar to two of the passengers on the car, while it was in Wood county, at the price of twenty cents for each drink. It was not proved or attempted to be proved that the defendant, or his employer, the Pullman Palace Car Company, had paid the occupation tax levied upon retail liquor dealers. It sufficiently appears from the evidence that the business of retailing spirituous liquors was being engaged in by the defendant, upon the car, and that such business had, for some time prior thereto, been carried on in this State, and elsewhere, upon the cars of the company while in transit.

It has been ably and ingeniously argued by counsel for appellant that it is no violation of law to engage in the business of retailing spirituous liquors upon these cars while in transit, without paying the tax, etc. They argue that the business of retailing liquors upon these cars to the passengers on the cars is not within the mischief intended to be prevented by the legislature, and is not within the spirit and intent of the law, although it may come within the express letter of the law. We think it is clearly within the letter of the law, and we can see no good reason why we should not hold it to be within the spirit and intent of the law.

The law is operative throughout the limits of the State, and operates upon all alike. It makes no distinction between persons, whether they be travelling or stationary, whether they be the owners or conductors of a palace car, or the driver of a hack or other vehicle. Whenever one of these palace cars crosses the line into

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this State it is within the jurisdiction of the laws of this State, and all persons who are transported by it are subject to those laws, and as much bound to obey them as any citizen of the State. We could elaborate our views upon this question, and advance many and cogent reasons for holding as we do, but we think it sufficient for us to say that neither the letter nor the spirit of the law exempts the Pullman Palace Car Company, or any other corporation or person, from its operation, — and that it is as much a violation of law to engage in the business of retailing spirituous liquors, without paying the occupation tax, upon a car travelling over a railroad, as it is to carry on that business in the usual mode.

Appellant also claims that as he was only an employee of the Palace Car Company, who were the proprietors of the business, he is not subject to this prosecution. We think he was “a person engaged in the business,” in the meaning of the statute. To hold otherwise would render the law practically ineffectual in all cases where the proprietor or owner of such business was beyond the jurisdiction of the courts of this State, as in this case. A non-resident could, through agents and employees, violate this law with impunity.

[Omitting other points.]

There are other questions presented in this case which we think are not of sufficient importance to be discussed. We have discovered no errors in the proceedings, except those above noticed in the charge of the court, and for which errors the judgment is reversed and the cause remanded.

Reversed and remanded.

WOOD V. STATE.

(12 Tex. Ct. App. 125.)

Criminal law — chance verdict.

A jury having agreed on a verdict of murder in the second degree, but disagreeing as to the term of imprisonment to be imposed, agreed that each member should mark a number not more than fifty nor less than five, and that the aggregate divided by twelve should stand as the number of years of imprisonment. *Held error.**

* See note, 34 Am. Rep. 815.

CONVICTION of murder in second degree. The opinion states the case.

King & Foster, for appellant

H. Chilton, assistant attorney-general, for State.

HURT, J. T. J. Wood, the appellant, was convicted of murder of the second degree, his punishment being assessed at confinement in the penitentiary for the term of forty-six years and three months.

There is but one matter requiring discussion, as the other supposed error will not recur upon a new trial. By affidavits of jurors who tried the case, it appears that the jury agreed upon the guilt of the defendant, but were not agreed upon the punishment. In order to determine the length of time that should be imposed, they agreed that "each should put down any number of years not to exceed fifty, and not less than five, add the numbers together and divide by twelve, the quotient being the punishment." They also agreed before the numbers were set down, to abide the result. Eleven put down fifty, and one five years. By addition and division the quotient is forty-six years and three months, the amount of the verdict. This verdict was returned into court, and each juror stated that it was his verdict.

To this process, by which his punishment was ascertained, the defendant objected, and urged his objection in his motion for new trial. The court overruled his motion, and defendant urges this matter as a ground for reversal.

Did the court err in overruling the motion? We think so. The Code of Criminal Procedure provides that new trials in cases of felony shall be granted, "where the verdict has been decided by lot, or in any other manner than by a free expression of opinion of the jurors." This verdict may not have been reached by lot, but was it a fair expression of opinion of each juror who tried the defendant?

It will be observed that in the case before us the jurors agreed before the amount was ascertained, that they would abide by the result. This is fatal to the verdict. "A jury may ascertain what the amount will be, and if the amounts produced gives satisfaction, they may return it as their verdict." But they cannot agree before the amount is ascertained that they will abide by it; and if they do, it is error for which a new trial will be granted. *Harvey v.*

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James, 3 Humph. 157; *Leverett v. State*, 3 Tex. Ct. App. 213; *Baker v. Bennett*, 3 Humph. 160.

“ The impropriety consists in the agreement to be bound by the result. *Dorr v. Fenno*, 12 Pick. 221. Nor will the fact that each juror, when the verdict was returned, stated that it was his verdict, cure or heal the matter. In felony cases the citizen's life, liberty and character being at stake, the verdict of the jury should be the result of reason, deliberation, and honest conviction, and not the offspring of chance, accident or any agreement which hampers or embarrasses a juror in a free expression of opinion. The judgment is reversed and the cause remanded.

Reversed and remanded.

COMPTON v. STATE.

(13 Tex. Ct. App. 271.)

Criminal law — witness — husband and wife.

Under a statute permitting husband or wife to testify the one against the other in a criminal prosecution for an offense committed by one against the other, the wife is not competent against the husband on a prosecution against him for incest with her daughter, his step-daughter.

CONVICTION of incest. The opinion states the case.

H. Chilton, assistant attorney-general, for State.

WHITE, P. J. A motion in arrest of judgment, which was overruled, questioned the sufficiency of the indictment upon which defendant was tried. The crime intended to be charged was incest. As set forth in the indictment, the charge is, “ that about the first day of October, A. D. 1881, in Robertson county, Texas, and divers other days, both before and after said first day of October, 1881, Daniel Compton, an adult male person, did unlawfully and carnally know one Laura Griffin, a female person, over the age of ten years, the said Laura Griffin then and there being the daughter of Mrs. Sarah Compton, the lawful wife of him the said Daniel Compton, against the peace and dignity of the State.

[Minor points omitted.]

On the trial Mrs. Compton, wife of defendant, was placed upon the stand by the prosecution as a witness against him. She was objected to by defendant as incompetent for the purpose under our statute, which provides that "the husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other." Code Crim. Proc., art. 735. This objection was overruled, and the witness permitted to testify. In his ruling the learned judge doubtless was guided and controlled by two decisions of this court, the cases of *Morrill v. State*, 5 Tex. Ct. App. 447, and *Roland v. State*, 9 id. 277, to the effect that adultery of one of the parties to the marriage contract was in its nature such a crime committed against the other as to render that other competent to testify against the offending party. If this doctrine was correct, then it would follow inevitably that in a case of incest such testimony would be undoubtedly competent *a fortiori*, because to the wrong of adultery is added the double wrong and injury that it is an outrage upon nature in its dearest and tenderest relations, as well as a crime against humanity itself.

The question is, do the decisions in *Morrill's* and *Roland's* cases lay down the correct rule, or is the doctrine as enunciated a strained and unwarranted construction of the language of the statute *supra*? The exception is that they are competent to testify in "prosecutions for an offense committed by one against the other." We are aware that the cases of *Morrill* and *Roland* are not without authority to support them. Notably as in *Bennett v. State*, 31 Iowa, 24, cited in *Morrill's* case, and in *Tilton v. Beecher*, a celebrated case of *crim. con.*, wherein the plaintiff was offered as a witness to prove his wife's adultery, and after elaborate argument and citation of authority the court held he was entitled to testify. See note 6 to Whart. Crim. Ev., § 396. Again, in *Sloan v. People*, a case recently decided by the Supreme Court of Iowa, it was held that the first wife is a competent witness against her husband who has been indicted and is upon trial for bigamy, it being a crime committed against her.

A more thorough investigation and consideration of the subject has however led us to conclude that the great weight of authority, English and American, is against the doctrine of the *Morrill* and *Roland* cases, and appears to be more consonant with the

reason and policy of the law. Before those decisions were rendered (a fact which seems to have been overlooked, at all events it is not noticed or alluded to in either of those opinions), our Supreme Court held, in construing this statute, that the wife could not testify against her husband upon trial for theft of her property; and the language used in reference to the meaning of the statute was that "its plain and obvious import is to limit the permission given to the husband and wife to testify against each other to prosecutions for personal offenses by one against the other." *Overton v. State*, 43 Tex. 616.

Mr. Russell, in his work on Crimes, says: "The wife is also admitted as a witness against her husband *ex necessitate* in a prosecution of him for offenses against her person. * * * But this rule seems to be confined to cases where the charge affects the liberty or the person of the wife." Sharswood's Russell, vol. 2, p. 984.

Mr. Wharton says: "Marriage however being proved, neither husband nor wife is competent at common law to testify in a suit for or against the other. Thus the husband is incompetent in a prosecution against his wife for her adultery, and so, *mutatis mutandis*, is the wife against the husband; but if the paramour be prosecuted singly, it is held that the restriction does not continue in force." Whart. Crim. Ev., § 390. Again he says: "Where however violence has been committed on the person of the wife by the husband she is competent to prove such violence. Hence on the trial of a man for the murder of his wife, her dying declarations are evidence against him. And in all cases of personal injuries committed by the husband or wife against each other the injured party is an admissible witness against the other. * * * And it is plain that in cases not involving personal injury the wife cannot at common law be called against her husband." § 392.

And again: "The reason for the exclusion of husband and wife when called for or against each other being social policy and not interest, statutes abolishing incompetency resting on interest do not remove the common-law incompetency of husband and wife for or against the other." § 400. In New York it has been held that upon a trial of the husband for bigamy the wife was incompetent to testify against him. 24 New York, Hun, 501; Whart. Crim. Ev. 397.

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Our conclusion is that reason and the weight of authority is against the rule upon the subject as laid down in *Morrill v. State* and *Roland v. State*, and so those cases are overruled.

We are of opinion that Mrs. Compton was not a competent witness in the prosecution for incest against her husband, and that the objections to her testimony were improperly overruled. Other questions presented not incident to this are not deemed of sufficient importance to require discussion.

The judgment is reversed and the cause remanded.

Reversed and remanded.

HAUN V. STATE.

(12 Tex. Ct. App. 382.)

Constitutional law — conclusion of indictment.

An indictment concluded, "against the peace and dignity of the State, this the third day of November, 1882." *Held*, a violation of the constitutional provision that indictments shall conclude "against the peace and dignity of the State."

CONVICTION of forgery. The opinion states the case.

Crans & Sparkman, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. In this case the indictment concludes as follows: "Against the peace and dignity of the State, this the third day of November, 1882." Exceptions were made to the indictment and overruled. One of the exceptions urged to the indictment was that it did not conclude as required by law. We think this exception was well taken and should have been sustained.

In the case of *Cox v. State*, 8 Tex. Ct. App. 254; s. c., 34 Am. Rep. 746; this question is elaborately discussed, and all the authorities bearing upon it are reviewed and cited, and the conclusion arrived at that it is a constitutional requirement that the conclusion of an indictment shall be "Against the peace and dignity

of the State," and that this is a matter of substance as well as of form, which it is not within the power of the courts to dispense with or disregard.

It is contended by the assistant attorney-general that the words "this the third day of November, 1882," with which the indictment concludes, are no part of the indictment, and should be treated as surplusage. In support of this view he cites *Thomas v. State*, 8 Tex. Ct. App. 344. In that case the words "a true bill," were indorsed on the margin of the indictment. The words objected to did not form a part of the indictment, as in this case. They did not follow the words "against the peace and dignity of the State," as they do in the indictment before us.

What are we to understand by the conclusion of an indictment? Does it not signify the end of it, the final termination of the allegations of the pleader? We think it can mean nothing else. It is required that the conclusion shall be "Against the peace and dignity of the State." Nothing more shall be alleged or stated after these words. They constitute the end, the final termination of the indictment. If this be not the meaning of the requirement, we confess we are unable to say what it does mean. If the words with which this indictment concludes are no part of it, and can be rejected as surplusage, then any other words or allegations with which the pleader may choose to conclude his indictment may be so treated, and if this be the construction which should be placed upon the constitutional requirement under discussion, it would render it meaningless, and of no imaginable efficacy. This view of the question we do not consider is in conflict with *State v. Pratt*, 44 Tex. 93, in which it was held that the addition of the word "Texas" after "State" did not vitiate the indictment, because that word neither detracted from nor added to the sentence, but meant exactly the same thing.

[Minor points omitted.]

Reversed and remanded.

WOOLDRIDGE v. STATE.

(18 Tex. Ct. App. 448.)

Criminal law — misspelled verdict.

A verdict of "guilty of murder in the *fst* degree" is invalid. (*See note, p. 716.*)

CONVICTION of murder in the "fst degree." The opinion states the point.

H. Chilton, assistant attorney-general, for State.

WHITE, P. J. [Omitting other matters.] We come now to the consideration of the objections urged to the sufficiency and validity of the verdict. It is in these words, viz. : "We the jury find the defendant Ben Wooldridge guilty of murder in *fst* degree, and assess the punishment of death."

Instead of the word "*first*" the jury have used the word "*fst*" or in spelling the word "first" have omitted the letter "r." This is the error contended for, i. e., that the jury have not found the defendant guilty of murder in the *first* degree, and that consequently the judgment rendered was not warranted, nor is it supported by the verdict. Defendant presented the insufficiency of this verdict as one of the grounds of his motion for a new trial, which was overruled. A most serious question is here presented, and no case directly in point has been found in our own or the decisions of other courts of the country. We must determine it by a fair and proper construction of our statutes relating to the subject matter, and by analogies drawn from well settled principles of the law. It is to be particularly noted that here we have no case of the misspelling of a word; the word used is "*fst*," is properly spelt "*fist*," and is a word as well defined and as well known to the English language as any other word in daily common use. It is further to be noted that this word "*fist*" is not pronounced, and cannot by any contortion of pronunciation be made to sound, like the word "*first*;" and consequently the well recognized doctrine of *idem sonans* is not applicable and must be eliminated from the discussion.

Now what are the statutory and legal rules with regard to verdicts?

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"A verdict is a declaration by a jury of their decision of the issues submitted to them in the case, and it must be in writing and concurred in by each member of the jury." Code Crim. Proc., art. 705. Three things are requisite: First, it must declare the issues; second, it must be in writing; third, it must be concurred in by all the jurymen.

Again: "When the jury have agreed upon a verdict they shall be brought into court by the proper officer, and if when asked they answer that they have agreed, the verdict shall be read aloud by the clerk, and if in proper form and no juror dissents therefrom, and neither party requests to have the jury polled, the verdict shall be entered upon the minutes of the court." Code Crim. Proc., art. 710.

"The verdict in every criminal case must be general; when there are special pleas upon which the jury are to find, they must say in their verdict that the matters alleged in such pleas are true or untrue; where the plea is not guilty they must find that the defendant is either 'guilty,' or 'not guilty,' and in addition thereto they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty." Code Crim. Proc., art. 712.

"Where a prosecution is for an offense consisting of different degrees, the jury may find the defendant not guilty of the higher degree (naming it), but guilty of any degree inferior to that charged in the indictment or information." Code Crim. Proc., art. 713.

These are the general statutory rules with regard to verdicts in all criminal cases of whatsoever character. As seen, it is expressly declared that "the verdict in every criminal case must be general." What is meant by this? Simply that the verdict must find generally that defendant is "guilty" or "not guilty." Every verdict must ascertain and declare one or the other of these general issues — issues general because involved in all criminal cases. Beyond this general feature of the verdict in each particular case, the verdict may be said to be *quasi* special to the extent that it declares the special pleas of defendant (when interposed) "true" or "untrue," whenever it assesses a punishment, or in a prosecution for an offense consisting of different degrees, where it acquits of the higher and finds an inferior degree.

But with regard to these general verdicts, and as applicable in-

discriminately to all criminal cases (except murder, as we propose hereafter to show), certain rules of construction to test their validity have been adopted and settled by the courts. As for instance that "neither bad spelling nor ungrammatical findings of a jury will vitiate a verdict when the sense is clear." *Koontz v. State*, 41 Tex. 570; *Haney v. State*, 2 Tex. Ct. App. 504; *Krebs v. State*, 3 id. 349; *Taylor v. State*, 5 id. 569; *McCoy v. State*, 7 id. 379. Yet in these cases if the verdict is unintelligible it will not be permitted to stand. Id. Other rules are, that in construing verdicts the object is to get at the meaning of the jury; that verdicts are to have a reasonable intendment, and to have a reasonable construction. They are not to be avoided unless from necessity originating in doubt of their import, or immateriality of the issue found, or of their manifest tendency to work injustice. And it is moreover said that a verdict is sufficient when the jury have clearly expressed an intention to find the accused guilty of the crime charged in the indictment, and to assess his punishment within the terms of the law. And so a verdict is sufficient if the judgment rendered upon it can be pleaded in bar of another prosecution for the same offense. *Lindsay v. State*, 1 Tex. Ct. App. 327; *Williams v. State*, 5 id. 226; *Chester v. State*, 1 id. 703; *Bland v. State*, 4 id. 15; *McMillan v. State*, 7 id. 100; 1 Bish. Crim. Proc., § 1005.

These rules are all well settled, and so far as they apply to criminal cases generally we do not pretend to controvert or deny them. As said above however every verdict in all criminal prosecutions must to some extent be a special finding. Suppose special pleas, for instance, have been interposed, and the jury, though finding the defendant guilty, have failed to find the special plea to be "true" or "untrue." Would the verdict be sufficient, could and would the court be authorized to infer and conclude that they intended by finding him guilty to find, and that the verdict could only be reasonably construed to mean, that they must have found the special plea was untrue, else they never could have found him guilty? By no means could such inference or intendment be indulged. Why? Because the statute is imperative that the verdict must say that the matters alleged in the plea are either "true" or "untrue." Code Crim. Proc., art. 712; *Deaton v. State*, 44 Tex. 446; *Taylor v. State*, 4 Tex. Ct. App. 40; *Brown v. State*, 7 id. 619. Or suppose the jury should fail to impose the fine or assess the penalty where not absolutely fixed by law, would

any court be authorized or warranted in holding the verdict sufficient, and in supplying the deficiency and awarding a punishment commensurate with the finding? We are apprised of no such authority derivable from our law. On the other hand such verdict would manifestly be insufficient under our laws to support a judgment imposing a fine or inflicting a punishment. Such a verdict would in fact be but a dead letter, a nullity to which nothing could give force or vitality.

So then it appears, that with regard to misdemeanors and ordinary felonies, there are certain matters which the verdict must also specifically declare, and which if not declared, cannot be cured by intendment, inference or necessary deduction. And it will be seen that these matters, which are incurable if not found, and incapable of explanation if not certainly and explicitly found, are all those which, by law, are specifically and exclusively confided to the jury, and to them alone; and, in so far as they are thus confided, the verdict will be, and must be, treated as special with reference to them.

Now let us see what differences, if any, exist in the rules above noted and those applicable to murder cases. At the very outset of the investigation, we are met with the statute which declares that "if the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree; and if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty; and in either case they shall also find the punishment." Penal Code, art. 607.

Language cannot well be stronger or more imperative. "They shall also find by their verdict whether it (the murder) is of the first or second degree." In construing this statute, the leading case decided by our Supreme Court is *Buster v. State*, 42 Tex. 315, wherein the verdict was: "We the jury find the defendant guilty as charged in the indictment and assess his punishment to be hung by the neck until dead." MOORE, J., delivering the opinion of the court, said: "It must clearly appear from the verdict, not only that there is no conflict in the finding of the jury on the issue of the guilt and the assessment of the penalty, but their determination in the one must be in harmony with, and supported by, that in the other. To support the judgment, the court must be able to see from the verdict of 'guilty' returned by the jury that it author-

izes and requires the assessment of a penalty affixed by law, or that the penalty assessed by the jury is warranted by law; and also that the jury are not mistaken in the character or degree of the offense of which they have in fact found the defendant guilty, and imposed a penalty not affixed to it by law. How can the court know this unless the verdict finds the offense, or its degree, as well as the penalty? It is but arguing in a circle to say that the jury have found the defendant guilty of murder in the first degree because they have fixed the penalty of death, and that they were warranted in assessing the punishment of death because they found him guilty of murder in that degree. * * * Unless the defendant is found guilty of murder in the first degree, the court, as we have said, cannot say they have not assessed a penalty not warranted. To guard against the possibility of such a result, and to prevent the commutation, by juries, of the penalties fixed by law, had, no doubt, great force in inducing the legislature to require juries to find the degree of the offense in their verdicts, as well as assess the penalty in those cases in which this duty is confided to them. But whatever may have been the motive for its enactment, thus it is plainly written in the Code, and until altered and repealed, it is evidently the duty of the court to observe and enforce it." All the authorities in our State (except *Holland v. State*, 38 Tex. 474, which has been overruled) hold, as in *Buster's* case, that in a murder trial the verdict of conviction must specify the degree. Clark's Crim. Law, p. 214, note "Verdict."

In all the other States where the statute requires that the verdict shall find the degree in murder cases (with the exception of New York alone, perhaps), a similar construction has been adopted to that enunciated in *Buster's* case, as above quoted. Mr. Bishop says: "The view sustained by most of the authorities, and probably best in accord with the reason of the thing, is that the legislature meant by this provision to make sure of the jury's taking into their special consideration the distinguishing features of the degrees and passing thereon. Hence this provision is in the full sense mandatory; and unless they find the degree in a manner patent on the face of the verdict, without help from the particular terms of the indictment, it is void. No judgment can be rendered thereon, but a second trial must be ordered. 2 Bish. Crim. Proc., § 595, and note with authorities cited.

Our conclusion from these authorities is that in murder cases

Wooldridge v. State.

the jury are absolutely required to find the degree if they ascertain the accused to be guilty, and that in so far as finding the degree is concerned the verdict is special in its nature as contra-distinguished from the rules governing and controlling general verdicts. The characteristic distinction and difference between these two classes of verdicts may be concisely stated thus, viz.: A general verdict is so called because the whole matter in issue is found generally; a special verdict is so called because some matter of fact is thereby found specially. 10 Bac. Abr. 308-9. The degree, that is the specific degree, is a matter of fact specially required in murder verdicts.

Now what are the rules of construction with regard to special verdicts? In *State v. Bell*, 76 N. C. 10, it is said: "It is familiar law that nothing can be added to a special verdict by inference. If it omits to set forth any fact essential to constitute the offense charged, it is defective." In *State v. Blue*, 84 id. 807, it is said: "In finding a special verdict the facts should be stated fully and explicitly, and the omission of any fact necessary to constitute the offense is fatal. The practice is when the verdict is insufficient, insensible, or in violent antagonism to the evidence, to set it aside and grant a new trial." Citing 3 Whart. Cr. L., § 3188; *State v. Wallace*, 3 Ind. 195; *State v. Lowry*, 74 N. C. 121. In *State v. Custer*, 65 id. 56, it is said: "In Hawkins' Pleas of the Crown, vol. 2, p. 622, one of his twelve points said to be settled as follows, 'that the court judging upon a special verdict is confined to the facts expressly found, and cannot supply the want thereof as to any material part thereof, by an agreement or implication from what is expressly found.' * * * In Hawkins' Pleas of the Crown, 622, note 2, it is said, 'if the verdict do not sufficiently ascertain the fact, a *venire de novo* ought to issue;' and so are other authorities." s. c., 2 Cr. L., Greenl. 748.

In *Levison v. State*, 54 Ala. 520, it is said: "It has been uniformly decided that under an indictment for murder a judgment of conviction cannot be rendered on a verdict of guilty which does not expressly find the degree of the crime. 16 Ala. 781; 40 id. 698; 42 id. 509; 48 id. 52. In *Johnson v. State*, 17 id. 618, it was held that 'the rule was not varied because the indictment charged that the murder was by poisoning.' We do not doubt the correctness of these decisions; they are in conformity to the imperative terms of the statute, and no arguments drawn from the

objects it is supposed the statute was intended to accomplish can justify a departure from them." Citing Whart. Hom. 197; *People v. Campbell*, 40 Cal. 137.

In *Clay v. State*, 43 Ala. 350, it was held that "a special verdict cannot be aided by intendment, or by reference to any extrinsic fact appearing in the record. In such a case the court should arrest the judgment on motion of the accused, and order a *venire facias de novo* to be awarded."

The same court, in *Weatherford v. State*, say: "But why speculate about this matter? The wiser and safer course is to do just what the law requires, and to do it in the way the law requires. We have determined at this term, in the case of *Edgar v. State*, a case vary like this, that the jury must by their verdict determine both the character and the extent of the punishment. 43 Ala. 319. See also 42 id. 509.

When we apply these plain and well-settled rules to the verdict before us, what is the inevitable conclusion which forces itself upon us as to its sufficiency, measured by analogy with these standards of the law? Have the jury found defendant guilty of murder in the first degree? To enable us to so hold, we must strike from the verdict a word which they have plainly spelled—a word in every day use in our language—and substitute in its place another and entirely different word, which we only infer they must have intended instead of the one they have used. Can we do this? If so, then we can take the same liberty with any other word used. If courts can be allowed to indulge in such inferences and intendments in cases involving the life and liberty of the citizen, then why have the inestimable right of trial by jury at all? If the court can substitute a verdict which the jury have not found, or find one when they have found none at all, then why have a jury? Why not let the court find the entire verdict without the intervention of a jury? If the jury are required to declare the issues found in their verdict, then, unless the issues are found by them, the verdict is not theirs. There must be no doubt to be supplied by mere intendment or inference, when the life of a human being is dependent upon it. This court will not assume such responsibility whilst the law fixes the determination of the issue alone in the breasts and consciences of twelve jurymen of the country. We may be satisfied of defendant's guilt of murder in the first degree, and we may be satisfied the jury so intended to find, but until they have so expressly found we cannot

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give our sanction that human life shall be taken whilst there is any uncertainty with regard to it. The jury have not expressly found it in this case. Their verdict is not only uncertain, but unintelligible and senseless. Even *idem sonans* will not aid it. It finds defendant simply guilty, without finding the degree, and such a verdict by all the authorities is held insufficient.

But it may be said the verdict ought to stand because, when the jury brought and returned it into court it was evidently read "first degree" by the clerk, and assented to by the jury as thus read. It seems that they have some such rule of receiving and construing and doctoring up written verdicts over in Louisiana, but the reason why they assume such authority in that State is stated in the case of *State v. Ross*, 32 La. Ann. 854. In that case it was held that the verdict of the jury is not illegal and null because written, "guilty without capital parnish," when read aloud and distinctly announced by the clerk as "guilty without capital punishment." "Besides, the law does not require, even in cases of capital punishment, that the jury should reduce their verdict to writing." Here, as we have seen, the verdict must be in writing, and the Louisiana rule cannot be invoked.

In conclusion, we hold that the verdict in this case is a nullity—the jury have not found the degree of murder of which defendant was guilty. This the law requires they shall do. If defendant is to hang, let him hang according to law. Passing upon a defective verdict of similar character, the Supreme Court of California, in *People v. Ah Gow*, say: "It is difficult to find any justification or excuse for the entry of such a verdict. The court may in any case instruct the jury as to the form of their verdict, and if it appears from their verdict as first returned that they do not know the proper form, it is the duty of the court to instruct them in that regard, and direct them to return the verdict in such form that the judgment of the law may thereupon be pronounced. Mr. Bishop says: 'It seems quite plain that in every case of a verdict rendered, the judge, or prosecuting officer, or both, should look after its form and its substance so far as to prevent a doubtful or insufficient finding from passing into the records of the court, to create embarrassment afterward, and perhaps the necessity of a new trial. The want of precaution in that matter has led to many adjudications for which the occasion ought never to have been furnished.'" 2 Bish. Crim. Proc., § 831; 53 Cal. 627.

Wooldridge v. State.

Because the verdict in this case is insufficient and does not support the judgment rendered, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

HURT, J., dissents.

NOTE BY THE REPORTER.—See note, 28 Am. Rep. 420. For criticisms on this decision, see 27 Alb. L. J., pp. 341, 381, 422.

In *Walker v. State*, 13 Tex. Ct. App. 618, the court held a verdict of "guilty of murder in the first degree" valid. They observed: "By the ninth assignment of error the sufficiency of the verdict as returned into court, and upon which the judgment of conviction is based, is called in question. This verdict, as we copy it from the judgment entry, the original not having been sent up with the record, reads as follows: 'Wee the jurors finde the defendant guilty and of mrdur in the first degree, and assess his confinement in the penetentiary for life.' It is objected to this verdict, 1, that it finds defendant guilty of no offense known to the law; and 2, that it does not assess the punishment as required by law. It will be perceived that in the verdict the defendant is found guilty of *mrder*, the letter 'u' being left out of the word which the jury evidently intended to use.

"In the *Wooldridge* case, decided by this court at the present term, *ante*, 443, the rules governing verdicts in murder cases were elaborately discussed, and it is unnecessary for us to reiterate them. In that case the word 'fist' was used in the verdict, instead of the word 'first,' in finding the degree of the murder. It was held that these two words were well-known and commonly used words, having entirely different meanings, and not sounding alike, and that the one could not be substituted for the other, or construed to mean the other and that the verdict was insufficient. It was however expressly stated in the opinion in that case, that as the word 'fist' used in the verdict did not have the sound of the word 'first,' which should have been used, the question of *idem sonans* was eliminated from the case, and was not considered.

"In the case before us the question of *idem sonans* does arise, and directly affects the verdict. If the word 'mrder' used in the verdict is not *idem sonans* with the word 'murder,' then manifestly this verdict is insufficient and must be set aside. But if the words are *idem sonans*, then the verdict must be sustained, notwithstanding the bad spelling of the word in the verdict, for it is well settled that incorrect orthography or ungrammatical language will not vitiate a verdict. *Taylor v. State*, 5 Tex. Ct. App. 569; *Koontz v. State*, 41 Tex. 570; *McMullan v. State*, 7 Tex. Ct. App. 100; *Curry v. State*, *id.* 91.

"In applying the doctrine of *idem sonans*, the rule is that if the words may be sounded alike without doing violence to the power of the letters found in the variant orthography, then the words are *idem sonans*, and the variance is immaterial. *Henry v. State*, 7 Tex. Ct. App. 388; *Ward v. State*, 28 Ala. 53; *Gresham v. Walker*, 10 *id.* 370; *Gahan v. People*, 58 Ill. 160.

"Applying this rule to the word 'mrder,' used in the verdict, we hold it to be *idem sonans* with the word 'murder,' as properly spelled, and that the variance in the orthography of the two is not a material one, but that their sound is so nearly the same, when pronounced, that there is scarcely if in fact any difference. They are not different words correctly spelled and not sounding alike, as in the *Wooldridge* case, before referred to, but are in fact the same word differently spelled, but sounding alike. We think also that the doctrine of *idem sonans* applies to and governs verdicts in the same manner, and to the same extent, that it does in other matters. *Haney v. State*, 2 Tex. Ct. App. 604; *Taylor v. State*, 5 *id.* 569; *Huffman v. Com.*, 6 Rand. 695; *Williams v. State*, 5 Tex. Ct. App. 226; *State v. Smith*, 33 La. Ann. 1414."

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

BLACKWELL V. STATE.

(67 Ga. 76.)

Original law — evidence — compelling prisoner to exhibit his person.

On a trial for murder, the extent of an amputation of one of the prisoner's legs being a material question, it is error to compel the prisoner to exhibit his leg to the jury.

CONVICTION of murder. The opinion states the case.

McWhorter & McWhorter ; Worley & Carlton ; D. M. Dubose,
for plaintiff in error.

George F. Pierce, solicitor-general, for State.

SPEER, J. The plaintiff in error was indicted for the offense of murder. On arraignment and trial had, the jury found him guilty, and the sentence of death was pronounced against him. During the term of the court a motion for a new trial (subsequently amended) was made on various grounds, as set forth in the record, which was overruled by the court and defendant below excepted.

The evidence upon which the defendant was convicted was wholly and entirely circumstantial.

The third ground of the motion for new trial was as follows:

"Because the court erred in ordering and directing the defendant to stand up for the purpose of allowing a witness for the State then on the stand, to wit, R. E. Adams, to see and testify where his (defendant's) leg was cut off, and in admitting the testimony based on said inspection."

[Omitting a minor consideration.]

1. In reference to the third ground of the motion, it appears that R. E. Adams, a witness for the State, was being examined, who as appears in the record, was testifying as to tracks and impressions, as they appear to have been made on the ground at and near the house at which the deceased was slain the night before. He said: "The track we saw was left foot of man, and like he was on his knee of other leg; I saw where he got on the horse; there were three places where he had mired about six inches; we tracked the horse on out and found where it had run up against a chestnut limb; I knew the defendant; I knew the defendant Allen Blackwell, his right leg is cut off; he has a left foot but no right foot; (apron produced); that is a part of an apron such as shoemakers generally wear (the apron produced was a piece of old, striped cloth, about one-third or one-half yard long, with a string at upper end long enough to go around a man's neck); shoemakers generally wear aprons from material of that sort; the death occurred in Elbert county. Question (by the court); How much of his leg has the prisoner had cut off? Ans. I don't know, sir; I just know he is one-legged; I can't see." (Here, by order of the court, the prisoner stood up and showed his leg, and then witness answered:) "His leg is cut off below the knee."

The testimony thus quoted makes it clear that a portion of this testimony, thus allowed to be given by the witness against the prisoner, was in consequence of the order and command of the court in directing the prisoner "to stand up" before the jury that the witness might be enabled, from inspection, to testify as to the character and extent of the amputation of prisoner's right leg. Was this evidence admissible, and did the court have authority to compel the prisoner to make a profert of his person before a witness and the jury, in order to supply what the court must have deemed testimony material to the issue on trial?

Let it be borne in mind that a most material and important part of the testimony against the prisoner was the character of the track and signs made the night of the murder by the one, who in the dark, approached the house where deceased was and fired the fatal shot that caused her death. The track and sign indicated the assassin had but one leg, but the character of the other print on the ground depended materially upon the character of the amputation of the other limb, and it was no doubt to establish the correspondence between the amputated limb of prisoner and the signs on the ground, as testified to by the witness, that the court ordered prisoner to make proof of his limb to the witness testifying, and necessarily to the jury.

In the case of *Day v. State*, 63 Ga. 669, this court held: "Evidence that a witness forcibly placed defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, is not admissible." A defendant cannot be compelled to criminate himself by acts or words. The court say: "By the constitution of this State no person shall be compelled to give testimony tending in any manner to criminate himself; nor can one, by force, compel another against his consent to put his foot in a shoe-track, for the purpose of using it as evidence against him on the criminal side of the court."

In the case of *State v. Jacobs*, 5 N. C. 259, the court says: "A judge has not the right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro."

So in the case of *Stokes v. State*, 5 Baxt. 619; s. c., 30 Am. Rep. 72, the court held: "On an accusation of murder, it being claimed that certain footprints were those of the prisoner, the prosecuting attorney brought a pan of mud into court and placed it in front of the jury and having proved that the mud in the pan was about as soft as that where the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection, the court instructed the prisoner that it was optional with him whether he would comply. The prisoner refused, and the court instructed the jury that his refusal was not to be taken against him. The prisoner being convicted, held he was entitled to a new trial." See also *State v. Graham*, 74 N. C. 646; 21 Am. Rep. 493; 33 id. 540.

[Other points omitted.]

Millen v. Guerrard.

Let the judgment of the court below be reversed on the ground that the court erred in refusing a new trial.

Judgment reversed.

MILLEN V. GUERRARD.

(87 Ga. 284.)

Stock—corpus—dividends.

Under a bequest of stock in trust, the income going to a life tenant, with remainder over, dividends, whether in cash or certificates of indebtedness and although infrequent and unusually large, go to the life tenant.*

THE opinion states the facts.

William D. Harden, for plaintiffs in error.

G. C. Whatley, A. R. Lawton, Cunningham & Lawton, W. S. Basinger, for defendants.

JACKSON, C. J. Certain shares of Central and Southwestern Railroad stock were left by the will of Mrs. Millen to Guerrard, in trust for George R. Millen and his children, the income to be paid to Millen during life and remainder to his children, with contingent remainder over in the event of their death.

After probate of this will, the directors of the Central Railroad Company declared a dividend in certificates of indebtedness (in addition to a cash dividend) of \$40 per share on the Central and \$32 per share on the Southwestern stock, the Central Railroad having leased the latter road some years before on certain terms specified in the lease.

The question made in this case is, do these dividends go to George R. Millen, the life-tenant, or to the remaindermen? The will directs the income of the stock to be paid to the life tenant. Are dividends on stock the income of the stock? If not, what are they? They are certainly no part of the *corpus*. They do not increase the shares one iota, nor could these dividends have been so applied by the directors as to add to the *corpus*, that is to increase the stock.

* To same effect *Vinton's Appeal*, ante, 118.

because the limit upon the number of shares allowed the company by its charter is exhausted. These dividends could not be so used as to increase the *corpus*, and hence the directors declared the dividends, and gave them to the stockholders as dividends, and not as *corpus*.

What did the testatrix mean when she gave to George R. Millen for life the income of this stock? Most clearly she meant the dividends declared by the directors, for there is — there can be — no income from the stock of a railroad company, except the dividends declared thereon. Nor does the testatrix limit the amount or value of this income to be enjoyed for life by the life tenant. It matters not how little or how large the dividend declared, it is income from the stock, and it goes to the life tenant. No matter in what it be declared, whether in cash or in bonds, no matter whether it be the accumulation of years or of one year, if it be the income from the stock, and not the *corpus*, the stock itself, by the terms of the will, which is the law of this case, it goes to the life tenant. No matter what therefore may be the law in respect to cases generally which may arise under this action of the directors of the Central Railroad Company, in this case, under this will, these dividends, in the shape of these interest-bearing certificates, are income, and not *corpus*, and go to the life tenant, and not to the remaindermen.

But suppose that the will be not in the case, and that by any sort of deed or instrument of conveyance this stock were the property of one for life and of others in remainder, where would these dividends go — whose property would they then be?

That question will turn on the resolutions of the directors and the Code of this State, that is upon the true meaning and construction of those resolutions and of section 2256 of the Code.

The resolutions show that dividends due these shares of stock had been "withheld" for past years, that the owners of the stock had not received any thing "to represent their dividends and income thus withheld," and that therefore these certificates of indebtedness are issued. Clearly therefore these certificates represent, as declared on the face of the preamble and resolutions, past dividends withheld, and are declared in lieu of those dividends and that income from this stock which were withheld. It is as much as to say that the income from this stock was made in certain years, but not declared in those years for prudential reasons. Those reasons do not now exist. Therefore this, the income of those years, will

be declared as dividends now and be paid now. Suppose it had been declared in cash, would there be a doubt that the cash would be the money of the life tenant? We think not. Suppose it had been declared in bonds on other persons, on the State, or the United States, or a city, or other railroad corporation, would it not go just as cash would have gone? Most certainly it seems to us. What difference then can it make if the company gave its own bonds or evidences of debt as dividends representing past income? None logically, so far as we can discern it.

The directors thus calling these certificates of indebtedness dividends, and issuing them as dividends, we come to the question, where do they go under the Code of Georgia, to the life tenant or to the remaindermen?

The Code, section 2256, enacts that, "the natural increase of the property belongs to the tenant for life. Any extraordinary accumulation of the *corpus*, such as issue of new stock upon the share of an incorporated or joint stock company, attaches to the *corpus* and goes with it to the remainderman."

Are dividends, though unusually large, because withheld when they might have been declared but for prudential reasons, an extraordinary accumulation of the *corpus*, or are they the natural increase of the property, in the sense of the statute? We take it that the words, "natural increase" are used in antithesis to the subsequent words, "extraordinary accumulation," and they mean the ordinary accumulation of the property, that is, in case of stock, the ordinary increase of its value by larger dividends declared, whereby it may be worth much more in the income of the holder from it, goes to the life tenant; but any extraordinary increase or accumulation, by donation, or grant from the State of lands or other outside property, will go to the remaindermen. That property thus accumulated, not from the ordinary use of the means of the company, but from extraordinary outside accumulations attaching to the former means or *corpus* of the company and adding to that *corpus* or those means, assimilates with that, becomes part of it, makes it larger and productive of more fruit, and cannot be cut off by the life tenant, but must stand tied to the *corpus*, and with the *corpus* pass to the remaindermen.

But really dividends are the ordinary, the natural, the only natural income or increase of this sort of property. There can be no natural birth from this parent, except dividends be born of her

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Crusselle v. Pugh.

certificates of indebtedness, principal and interest, are the property of the life tenant, and the judgment of the court below denying the injunction is affirmed.

Cited for plaintiff in error. Code, § 2256.

For defendant. 1 Bouv. Dict. 695 ; 60 Ga. 93 ; 4 Vesey, 800 ; 10 id. 185 ; 13 id. 363 ; 14 id. 66 ; 1 McClell. 527 ; 7 Sim. 634 ; 15 id. 473 ; 16 id. 163 ; 5 Eng. Law and Eq. 164 ; 31 Beav. 280 ; 5 Eq. Cas. 238 ; 6 Allen, 174 ; 12 id. 359 ; 99 Mass. 101 ; 101 id. 571 ; 102 id. 542 ; 18 Barb. 646 ; 30 id. 637 ; 28 Penn. 368 ; 83 id. 256 ; 64 id. 256 ; 11 Leigh, 595. These cases, collated with much care, make a very useful and instructive history in chronological order from 1799 to 1868 of the English, Massachusetts and New York decisions on the general question of the respective rights of the life tenant and remaindermen to the increase of property.

Judgment affirmed.

CRUSSELLE V. PUGH.

(67 Ga. 480.)

Master and servant — negligence — lessor and lessee's servant.

A lessor is not liable to a servant of the lessee for an injury resulting from the negligence of the latter, unless it arose from some unperformed duty remaining upon the lessor, even though the servant was originally the servant of the lessor, was ignorant of the lease, and supposed himself still in the lessor's employ.

ACTION of damages for personal injury by negligence. The opinion states the cases. The plaintiff had judgment below.

Arnold & Arnold, for plaintiffs in error.

Milledge & Haygood, for defendant.

SPEER, J. Pugh sued Crusselle in the City Court of Atlanta for damages to the amount of \$3,000. He alleged that in April, 1871, he was employed by Crusselle in the capacity of a "striker" for one Gatewood, a blaster, who was also in the employment of Crusselle. That on the 19th of April, 1871, by reason of the careless

Crusselle v. Pugh.

and unskillful manner in which said blaster prepared charge of powder exploded prematurely, by reason eyes of the petitioner were so injured as to cause him and finally to deprive him of his eyesight. He further part compensation for the loss and injury done the petitioner, the defendant, authorized petitioner to buy of one house and lot at the price of \$200, which he promised and convey by deed to petitioner. That said lot was and in August, 1872, petitioner moved into it with his the belief that the defendant had the title made to him. That sometime after that, petitioner learning the deed so made, he saw the defendant, and he to allay the fears promised he should have the house and lot during his notwithstanding such promise, defendant had, in May, petitioner from the place thus given as part compensation damage done him in the loss of his eyesight, etc.

Subsequently plaintiff amended his writ, alleging that Crusselle, constituted Gatewood as his agent in his charge of and direct the blasting of the rock in the Crusselle, and plaintiff was hired by Crusselle to work Gatewood, to obey his instructions and do whatever he about blasting. That the work is a dangerous one un by a skillful man, one experienced in the business. Plaintiff employed only as a striker, and knew nothing about blasting he consented to work under Gatewood only with the understanding that Gatewood knew his business. On the contrary, Gatewood grossly ignorant of the business, and this incapacity was defendant, or would have been known to him had he taken care and diligence to inform himself; but in disregard defendant put Gatewood in charge of the work, and his unskillfulness and carelessness, the blast of powder prematurely and destroyed the eyesight of plaintiff, as out fault or negligence on the part of plaintiff.

And plaintiff avers he would have brought his suit against defendant for this damage and injury, but that defendant quieted him and induced him not to do so, by agreeing should have the title to the house and lot on Berry street, city of Atlanta, which plaintiff had been occupying since his chase from Dill until he was illegally ejected in March, 1872, by defendant. The property is worth \$500, and from

dollars per month rent. Plaintiff alleges his age at the time of the damage at forty-four years, and that he has a wife and children dependent; that he, defendant, had stated to divers persons he had given plaintiff the house as compensation for damages, etc. That defendant has ejected plaintiff and his family, poor and dependent, from the house. He therefore brings his suit, etc.

To this suit defendant pleaded the general issue and statute of limitations.

On the trial, the jury returned, under the evidence and charge of the court, a verdict in favor of the plaintiff for the sum of \$625; whereupon the defendant made a motion for a new trial on the various grounds as set forth in the record, which was overruled by the court, and plaintiff excepted.

[Omitting minor questions.]

3. The tenth alleged ground of error, was in the court charging the jury: "If they should believe, from the evidence, that when plaintiff originally went upon the work that he was in the employ of defendant, Crusselle, and that Pugh, at the time of the accident and up to the time of the accident, believed he was working still under Crusselle and had not been notified of Crusselle's sub-letting the quarry to Gatewood, then Crusselle would be liable to Pugh for the extent of the damage for the accident that happened to him (Pugh), provided you should believe that if it had been Gatewood solely, Gatewood would be liable;" and in not charging the jury "if plaintiff did have notice of the change of masters, or by the exercise of ordinary diligence could have known it, defendant would not be liable at all for the alleged injury."

We recognize of course the doctrine contended for by counsel for defendant in error, and as expressed in the Code, that "the principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business." Code, § 2202; 1 Kelly, 198. In the case of *McDonald v. Eagle & Phoenix Manuf. Co.*, decided at the present term, this court said, "The principal is liable for his own negligence or misconduct, and hence his liability rests on his own negligence or misconduct in the employment of his agents, and if he uses ordinary diligence in employing competent men, it is enough to relieve him. He is not liable for the negligence of a fellow-servant while engaged in the same employment, unless he has been negligent in the selection of that servant, or retained him after knowledge of his incompetency.

Nor will the fact that the person proved incompetent, of itself and without more, show negligence of the master, but it must further appear that the master knew, or might have known, by ordinary diligence, the incompetency of the agent or servant. Wood's Law of Master and Servant, 333, 423-432; 2 Thomp. Neg. 969; Sherm. & Redf. Neg. 31; 1 Am. Rail. 536."

The gravamen of the complaint against the defendant as set forth in the writ is, that the defendant had employed Gatewood as a superintendent or agent, to do the work of blasting in this quarry; that he was incompetent and unskilled in the work, and this fact was known to defendant, and by reason of this incompetency, unskillfulness and carelessness, the blast of powder was prematurely discharged, and plaintiff, who was working with him, was damaged, and by reason of the employment of this unskillful superintendent, defendant is liable.

There is no question that if the evidence submitted on the trial had supported this theory of the case, as set forth and alleged in the declaration, the defendant would have been liable. He is liable as a common master for the injuries done by one employee to another employee if his (the master's) own negligence or want of ordinary care and diligence is the cause of the injury. For instance, as in the case cited of *McDonald v. Eagle & Phoenix Manuf. Co.*, a master would be liable for an injury to a servant occasioned by the fault of a fellow-servant, if he failed to employ competent men to do the work in which the fellow-servant was injured, and which was caused by the want of skill in the servant causing the injury. The true test of liability is, was the master at fault or negligent, and did this fault or negligence of the common master lead to or result in damage to the servant by his fellow-servant?

But while a master is responsible to third parties for injuries arising from the negligence of his servant, it is the prevailing doctrine that a party who has contracted for the doing of certain work for his use and benefit is not liable for the injuries arising in the performance of such work. The distinction is predicated upon the ground that the master has the control of his servant, and can remove him for misconduct, while a contractor, as between him and his employer, is responsible only for the fulfillment of his agreement, and pending the performance is to a certain extent substituted for the party for whom the work is to be done. 2 Hilliard Torts, 436; 5 Ohio (N. S.), 38. One as master is liable as to third

persons for the acts of his servant, for the servant represents the master, and his act is the act of the master ; but the sub-contractor, and not the person with whom he contracts, is liable civilly for any wrong done by his servants in the execution of the work contracted for. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from want of care or skill ; but neither this principle nor rule can apply to a case where the party sought to be charged does not stand in the character of master to the party by whose negligent act the injury has been occasioned. If the defendant has no control over the men employed by the contractors or the contractors themselves, they could not dismiss them or direct their work. There usually cannot be more than one superior legally responsible. Hilliard Torts, 442-3 ; 27 Conn. 274 ; 4 Exch. 255. Where it is sought to make a proprietor or owner responsible, between whom and the employee injured there are intermediate contractors or sub-lessees, the principle is fairly stated and rule thus laid down in a case in 33 Am. Rep. 426 : "The main question in such cases is, whether any duty remained which sprang from the proprietor's own position and from the violation of which by the proprietor the damage arose."

Take the case at bar, and conceding the fact that Pugh was the servant of the defendant at the time of the injury, yet to make the defendant liable it must be shown, as alleged in the writ, that Gatewood was likewise the servant of the defendant, and that it was the carelessness or negligence of the defendant in employing Gatewood, alleged to be unskillful and incompetent, and whose unskillfulness was the cause of the damage before he would be responsible as the common master of the two. But in this case the evidence shows, without any conflict, that Gatewood (whose want of skill and experience it is alleged produced this disaster to the plaintiff below) was not at the time the servant or employee of the defendant, Crusselle. The written contract between them in evidence, as construed (and we think properly construed by the court), establishes the fact that Gatewood took charge of this quarry to work it, not as the superintendent, agent or employee of Crusselle, but as a lessee under him. And therefore the legal question made by the evidence, and which should have been ruled by the court was, whether a lessor is liable for the want of skill, carelessness or neg-

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this accident, Gatewood entered on the quarry under his lease, retaining some of the hands originally working for Crusselle and discharging others; that among those hands retained were Anthony Mell, the blaster, and Pugh, the striker; that under Gatewood these hands were working together for about a week, when Gatewood, for some cause, discharged Mell, the blaster, on Monday before the accident on Wednesday, and undertook himself the duties of blaster, or loading, when it is alleged, from his want of skill or inexperience, the blast prematurely exploded, and plaintiff was injured.

These being the facts established, under what rule of law can Crusselle, the lessor, be held liable for the fault of Gatewood, the lessee, to one working in the quarry leased by Gatewood? What right did Crusselle have to enter upon the premises leased to Gatewood, or control or direct his servants, or even to direct or control Gatewood, the lessee? The rule is, as we before stated, "The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business." But he may be made liable if by his negligence in employing an agent he secures one unfit for the work, and this want of skill leads to the injury of a co-employee. But in this case Gatewood was not employed as a servant of Crusselle at all: he leased from him the quarry, and the relation of lessor and lessee existed, not that of master and servant.

In view of these facts, we must hold that the rule of liability which the court gave in charge of the jury, and excepted to in the tenth ground of the motion, was error. To charge that because Pugh went to work originally under Crusselle, and up to and at the time of the accident he believed he was working still under Crusselle, and had no notice of the sub-letting of the quarry to Gatewood, then Crusselle would be liable, if Gatewood was liable, for the injury, we think, was error under the rules of law we have sought to lay down in this opinion.

We have examined with care the authorities cited by counsel for defendant in error, and in the case cited in 33 Am. Rep. 423, and specially relied upon, we find nothing in conflict with the views here expressed. In that case the mining company, a corporation, was held liable for damages to an employee of certain sub-contractors engaged in working the mine; but the court put it expressly upon the ground that in the contract the company (who were the owners)

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[Omitting unessential matters.]

The jury, under the evidence and charge of the court, returned a verdict in favor of the plaintiffs, except Wm. M. Barnard, George W. Barnard, and Annie M. Baker, for two-thirds of the property sued for and \$145.24 as *mesne* profits. Both sides filed motions for a new trial.

All the grounds in both motions were approved, and being then overruled by the court, both movants excepted thereto and assign error.

Both parties in this suit claim the premises in dispute under the will of Solomon Shad, made in 1829, and with its after codicils proved in 1833. The ninth item of the will is in the following words, and the construction of which involves the respective title of each party litigant as set up by them.

“Ninth, I give, devise and bequeath unto my executors herein-after named, and to the survivors and survivor of them, the remaining fourth part of all that my said trust lot in Derby Ward, the said fourth being the western fourth of the said lot, on Whitaker street, with the appurtenances; to have and to hold the said remaining fourth part of said lot, with the appurtenances, unto my executors and the survivors or survivor of them, and the executors and administrators of said survivor, in trust to and for the sole and separate use of my daughter Catherine E. Barnard, wife of Timothy Barnard, for and during the term of her natural life, not subject to her husband's debts or control, and from and after her death, in trust for such child or children as she may leave, his, her or their heirs and assigns forever, but if my said daughter Catherine shall die, leaving no children or child, then to my right heirs living at the time of her death.”

It appears from the evidence that Catherine E. Barnard, the life-tenant, died in September, 1861. Her children, who were in life at the time of her death, were Solomon S. Barnard and Mrs. Virginia Pritchard. Solomon S. died in February, 1875, leaving as his heirs his widow, Annie M. Barnard, and his children, Mrs. Mary C. Mallard (who died a few months ago), William M. Barnard, now about thirty-one years of age, George W. Barnard, about twenty-nine years of age, Annie W. Baker, twenty-six years of age, and Augusta Barnard, a minor, one of the plaintiffs.

Mrs. Virginia Pritchard died July 8, 1863, leaving five children. Virginia B. (now Mrs. White), born 4th May, 1854; George B.

Pritchard, born 2d of November, 1857; William R. Pritchard, 21st June, 1856; Edmund D., born 13th of September, 1859; Paul F., born 7th August, 1861. Catherine E. Barnard, the tenant under the will, had also a daughter who married the defendant, John C. Rowland, and who died in 1857, leaving one child who died, about nine years old, in 1865. It is as the heir at law of his wife and daughter the defendant claims. It may be noted that Mrs. Rowland, wife of defendant, died in several years previous to the death of her mother, the life tenant, Catherine E. Barnard.

The admitted facts are that the life tenant, Catherine E. Barnard, died in September, 1861, leaving two children only surviving to wit, Solomon S. Barnard and Mrs. Virginia B. Pritchard, whom plaintiffs' lessors claim. That Rowland's wife, the child, died before her mother, Catherine E., the life tenant, although leaving a child, Marion Rowland, who was the granddaughter of the life-tenant, and who survived the life-tenant.

It is further admitted that the suit was brought within ten years from the death of the life-tenant. It is contended by the plaintiffs below that Rowland's wife never had any interest in the property devised in the ninth item of the will, because she died before her mother, and therefore left none to her child. That her taking at all was contingent upon her surviving her mother. The ninth item of the will set out above gives the property to the executors in trust for testator's daughter, Catherine E. Barnard for life, "and from and after her death, in trust for such of her children as she may leave, his, her, or their heirs and assigns forever; but if my said daughter Catherine shall die, leaving no child or child, then to my right heirs living at the time of her death."

The question is, what was the testamentary scheme indicated by the testator in this item as to the property devised?

[Omitting this.]

One of the grounds of error complained of by the plaintiffs was the charge of the court on the subject of *mesne* profits. The plaintiffs alleged that the court erred in charging the jury "that the plaintiff could not recover rents voluntarily paid, or allowed to be paid by the defendant before suit," and in charging "plaintiff could not recover any *mesne* profits received by defendant before the trial bar."

"The action for *mesne* profits is a liberal and equitable

and will allow of any kind of an equitable defense." 2 Johns. Cas. 438. In the case of *Andrews v. Hancock*, 1 Brod. and Bing. 37, which was a rent case, the court held that where a voluntary payment was made, with full knowledge of the facts, the money could not be recovered.

The general principle underlying this question is stated in section 3121 of the Code: "Mere ignorance of the law on the part of the party himself, where the facts are all known and there is no misplaced confidence, and no artifice or deception or fraudulent practice is used by the other party either to induce the mistake of law or prevent its correction, will not authorize the intervention of equity." This principle was recognized in the case of *Arnold v. Georgia Railroad Company*, 50 Ga. 304, in which this court said: "If payment beyond the rate specified in the charter be made voluntarily by the shipper through mere ignorance of the law, or paid where the facts are all known, and there is no misplaced confidence, and no artifice or deception or fraudulent practice is used by the other party, an action will not lie to recover it back."

To allow the doctrine that ignorance of law is a ground of defense would overturn the foundations of every system of jurisprudence. Bateman on Com. Law, 26. Judge Story says: "As every man is presumed to know the law and to act upon the rights which it confers, when he knows the facts, it is culpable negligence in him to do an act, or set up a contract, and then set up his ignorance as a defense." 1 Story Eq. Jur. 149; 12 East, 38; 2 id. 469; 5 Taunt. 144; 8 Wheat. 215. Under this weight of authority and many others, it may be well said, as was said by the judges pronouncing the opinion of the Supreme Court of New York, in *Clarke v. Dutcher*, 9 Cow. 681: "Although there are a few dicta of eminent judges to the contrary, I consider the current and weight of authorities as clearly establishing the position that when money is paid with full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay, when in truth he was not. He shall not be permitted to allege his ignorance of the law, and it shall be considered a voluntary payment." It appears from the record, and is admitted as true, that Rowland, the defendant below, was paid, received the rents of his proportion of this estate

Larrabee v. Lewis.

without fraud or imposition. That he, as a tenant claiming under the same devise, with their consent had possession of the premises with the plaintiff's lessors and with whom they claim from August, 1865, and in common with their knowledge and consent, his proportion of the rent paid to him by the common agent of all who were interested in the case under the facts is a voluntary payment made with the knowledge and consent of the plaintiff's lessors and their privies, and the charge complained of was a correction of the law of the case to the jury as to the measure of recovery.

[Omitting other points.]

Let the judgment of the court below be affirmed.

Judgment

LARRABEE V. LEWIS.

(57 Ga. 561.)

Trade-mark — "Snowflake" crackers,

"Snowflake" is not a valid trade-mark for bread or crackers. (See

ACTION for injunction. The opinion states the facts and the defendant had judgment below.

Lanier & Anderson ; Harrison & Peebles, for plaintiff ;
error.

Mynatt & Howell, for defendant.

CRAWFORD, J. Larrabee & Company, manufacturers of bread and biscuits, and using the word "snowflake" as their trade-mark, filed a bill to enjoin T. S. Lewis from the use of the said word in his business, upon the ground that the said complainants had engaged for more than two years in their said manufacture and had used, and still claimed the right to use exclusively

said trade-mark as against all other persons whomsoever. And yet notwithstanding their said right, the said defendant being also a manufacturer of crackers and biscuits, has unlawfully, and without their consent, used in the sale thereof their said trade-mark of "snowflake."

To this bill the defendant filed a demurrer upon the grounds .

(1.) That the complainant had no right to appropriate the word "snowflake" as a trade-mark.

(2.) That it was not alleged that the defendant had used the word "snowflake" "with intent to deceive or mislead the public."

This demurrer was sustained by the chancellor, and that judgment is complained of as error.

1. The first question made is whether the word "snowflake" can be used and appropriated as a trade-mark.

A trade-mark is defined to be the name, symbol, figure, letter, form or device used by a manufacturer or merchant to designate the goods he manufactures or sells, to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and to secure such profits as result from a reputation for superior skill, industry or enterprise. Upton Law of Trade-Marks, 99. The trade-mark must designate and distinguish the owner's production from the general manufacture of the same article, and cannot consist of a word belonging to the general public describing truly a known product. 53 How. Pr. 453 ; s. c., 6 Am. L. T. 20.

A mere general description by words in common use of a kind of article, or its nature and qualities, cannot of itself be the subject of a trade-mark. 122 Mass. 139, 148.

A trade-mark which designates the true origin or ownership of the article manufactured or sold will be protected, but words which have no other relation to the origin or ownership of the goods than merely to indicate the name or quality, will not be protected. Nor will words be protected which all persons may use with equal truth as to the nature of a fact which they are used to signify, because all alike have the right to employ them for the same purpose. And so too a name merely descriptive of an article of trade, of its qualities, ingredients or characteristics, cannot be employed as a trade-mark, and the exclusive use of it entitled to legal protection. 2 Sandf. 599 ; 7 N. Y. Leg. Obs., 301 ; 7 Phila

253 ; 35 Conn. 402 ; 13 Wall. 311; 1 Holmes, 188
(Sick.) 223.

That one may use an arbitrary word when not describing character or quality of the article to be sold seems to be the ruling of various courts, noted instances of which are as the trade-mark for cigars, "Charter Oak" for stout, "Jack" for tobacco. These words not being in anywise descriptive of the character or quality of cigars, stoves or tobacco have been protected. *Hier v. Abrahams*, 82 N. Y. 519; 8 Sup. Ct. Rep. 589; 44 Mo. 168; *Cox Trade-Mark Cas.*, No. 66.

With these rules of law governing the question in record, can the word "snowflake" be classed as oneative of the character or quality of the articles under which to be sold? In its common and ordinary sense it is to be descriptive of whiteness, lightness and purity, and of necessity belong to the public — common alike to be applied therefore to crackers and biscuit, it affirms upon that they are white, light and pure. Whether used to quality or style of this sort of merchandise or not, it is those facts which others by its use may express with and therefore have an equal right to its use for the

Collins Co. v. Cowen, 3 K. & J. 428.

It is to be remembered that this word has no device whatsoever in connection with it. "Larrabee's Snowflake" is the defendant's label being "Lewis's Snowflake Biscuits." We are right therefore in our construction of the ordinary meaning of the word, then any one may make, label and sell "snowflake" biscuit, that is, such as are white, light and

[Omitting the second ground.]

Judgment

NOTE BY THE REPORTER.—See *Insurance Oil Tank Co. v. Scott*, 33 La. An. Rep. 286. In *Hecht v. Porter*, San Francisco Superior Court, 9 Pac. it was held no infringement to use as a trade-mark for India-rubber "Ironclad," which another had previously adopted for leather boots. The plaintiffs claim that their trade-mark "Ironclad" is one that is significant to boots, and that the word "boots" denotes a class within the meaning and hence that it covers every thing that comes under the definition of "boots." Defendants say "boots" are not a class, but that leather and rubber boots are each of a different class, and no purchaser can be deceived by the defendant's word "Ironclad" on the leather boots. The difficulty arises in the definition of "class." What is a class? The word "class" is not used scientifically by lawyers. We all know what the word "class" means when used scientifically, to-wit, classification. It is the largest enumeration in classification. We have "class," or

Larrabee v. Lewis.

'tribe,' 'genus,' and 'species;' and 'class' comprehends all these. It is certainly not used by the law authorities in a scientific sense: it is used in a general sense. The question in this case is, what is a class? Does the word 'boots' denote a class? The only authorities I have been able to find bearing upon what the word 'class' embraces are in Brown on the Law of Trade-marks, § 66: 'Protection will not be given unless in connection with the class of goods to which the mark has been applied Vice-Chancellor Wood, in 1865, remarked that the court had taken on itself to protect a man in the use of a trade-mark as applied to a particular description of article. He has no property in that trade-mark *per se* any more than a person has in any fanciful denomination which he may assume for his own particular use, without reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on his iron.' India-rubber and leather are entirely different articles — of different origin. One, rubber, is of vegetable origin, and the other, leather, is of animal origin. Rubber is substantially of vegetable origin. * * * Brown on Trade-marks, § 450, cited by plaintiffs' counsel, speaking of the criterion, says: 'The classification of commerce must be consulted. The *experimentum crucis* is this: What does a buyer ask for? An experienced tippler may say that he is at times unable to distinguish old whisky from brandy, so much are they alike in taste, and that that circumstance is a good reason why the halo of a trade-mark for one article should be considered broad enough to embrace the other. That is a question of evidence rather than of classifying. If the purchaser asks for brandy he does not wish for whisky. What does he believe he is getting? What does he ask for? If he asks for something and gets what he did not ask for, and knows it, he would not be deceived; but if he believe he is getting what he asked for, and is not, he would be deceived. Those two things constitute the criterion: What does a buyer ask for, and what does he believe he is getting? There are numerous kinds of boots: Men's boots, ladies' boots, gaiter boots, rubber boots, leather boots, canvas boots, etc. The plaintiffs manufacture a peculiar kind of rubber boot, and the defendants manufacture a peculiar kind of leather boot, not only different in material but in the manner in which it is made — a heavy, coarse leather boot, with rivets in each of the sides. It is claimed and proved that in ordering goods — 'ironclad boots' — confusion has arisen; defendants' boots having been sent for plaintiffs,' and *vice versa*. The criterion as just stated is, what does the purchaser ask for, and what does he believe he is getting? If a purchaser ask for 'ironclad boots' and Mr. Porter were to show him defendants' 'ironclad boots,' would the purchaser be deceived — would he believe he was buying plaintiffs' rubber 'ironclad' boot? I think not. The only way a party can be deceived within the meaning of the law of trade-marks is when the purchaser has an opportunity of not only looking at the trade-mark, but also at the article to which it is affixed. My conclusions therefore are that boots do not denote a class; that rubber boots and leather boots belong to different classes; and that no one is deceived by defendants using the word 'ironclad' on their leather boots.'

resided in Atlanta, and was residing here 6th May, 1878; was employee of the Atlanta City Brewery to deliver beer to the city customers of said company; was so engaged on morning of 6th May, 1878; was driving beer wagon along Broad street with beer for customers on south side of railroad; desired to cross railroad on Broad street bridge as the safest and most direct route; one approaching Marietta street, which crosses Broad street at right angles, noticed Broad street was blocked by a crowd of people and ropes were stretched across the street from the building on one corner to the other, on both the north and south sides of Marietta street where it intersected and crossed Broad. Saw several of the Atlanta police in the crowd on both sides of Marietta street in immediate vicinity of the ropes. Stopped my wagon; some one in the crowd told me to come on, that the ropes would be raised for me to pass under; drove on, passed under the rope on the north side of Marietta street safely, and crossed Marietta street, reached the south side; the rope across was there raised, and while I was passing under it the rope either fell or was lowered so that it struck me, and by it I was dragged and thrown violently off the wagon and seriously and permanently injured as alleged. Witness said there was a firemen's parade and exhibition in the city of Atlanta on that day. Cannot say whether any of the policemen held the rope at time I was injured.

Dr. Westmoreland testified as to the extent of the injuries the plaintiff had received on the day of the firemen's parade; and also plaintiff introduced the Northampton tables to prove the reasonable expectation of life of one of plaintiff's age, and closed.

Defendant moved a nonsuit, on the ground that the city had the right to obstruct its streets by ropes, etc., on the occasion of the public parades and drills of the firemen of the city, and that even if this were not so, the plaintiff was at fault in attempting to pass the obstructions, and the city was not liable; which motion for nonsuit was allowed by the court, and plaintiff excepted.

It is insisted by the defendant in error that there was no evidence showing that the ropes constituting the obstructions complained of were shown to have been placed there by authority or permission of the city, and that the presence of police officers there near the ropes, even if they were at fault in not at once removing said ropes, does not render the city liable for the default or misconduct of its officers, as has been ruled in 54 Ga. 468; 62 id. 299; *Rivers v. City*

unauthorized and illegal obstruction to its free use comes within the legal notion of a nuisance, and any such nuisance as would leave the street or way in an unsafe and dangerous condition, or impair its use in an unreasonable manner, or for an unreasonable time, would make the city liable for any damage resulting therefrom. 2 Dill. Mun. Corp. 722.

But it is not every obstruction, irrespective of its character or purpose, that is illegal, although not sanctioned by express legislative or municipal authority; on the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations. The carriage and delivery of fuel, grain or goods are legitimate uses of a street, though it may result in the temporary obstruction of the right of public transit: so the improvement of the street, the digging of cellars on adjacent lots for building, etc., are not invasions of the public easement, but simply incidents to or limitations on it. They can be justified when, and only so long as they are reasonably necessary. There need be no absolute necessity; it suffices if the necessity is a reasonable one. The right temporarily to obstruct a street springs from reasonable necessity, and is limited by it, and those who exercise the right must so conduct themselves as to discommode others as little as is reasonably practicable, and remove the obstruction or impediment within a reasonable time, having regard to the necessities and circumstances of the case; and when they have done this, the law holds them harmless. 51 Me. 264, 297; 67 id. 46; 24 Am. Rep. 437. That so long as the alleged obstruction is for the public convenience there can be no reasonable ground of complaint, was held in the case of *King v. Russell*, 6 B. & C. 566; but the extent of this principle has been since questioned. It is however a safe and reasonable rule to declare, that so long as the alleged obstruction is temporary and reasonable in its character and is intended for the public safety and convenience, it is no cause of complaint. Admitting that the obstructions here complained of were placed there for the public safety and convenience, to guard the drill and procession of the firemen's parade from intrusion and interruption, it would so far from being illegal and a nuisance for which the city should respond in damages, be on the other hand a wise and prudent forethought and provision to guard the public from collusion and preserve the order and discipline of the procession. An efficient fire department in a city like Atlanta is absolutely essential to the

JACKSON, C. J. The defendant was out on bail, was absent when the verdict was rendered, but his counsel was present, and a motion was afterward made to set aside the verdict. The refusal to grant this motion is the error assigned.

It is the right of the defendant in cases of felony, and this is one, to be present at all stages of the trial — especially at the rendition of the verdict, and if he be in such custody and confinement by the court as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside on a motion therefor. *Nolan v. State*, 53 Ga. 137; 55 id. 521; s. c., 21 Am. Rep. 281.

The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order.

But the case is quite different, when after being present through the progress of the trial and up to the dismissal of the jury to their room, he voluntarily absents himself from the court room where he and his bail obligated themselves that he should be. This difference is plainly indicated by the ruling in the *Nolan* case in 55 Ga., and the opinion of the court delivered in that case by Judge BLECKLEY. And the absolute necessity of the distinction, or the abolition of the continuance of the bail when the trial begins, is seen, when it is considered that otherwise there could be no conviction of any defendant unless he wished to be present at the time the verdict is rendered.

From the charge of the court, from the countenances of the jury, from the course of the argument, from the hints or misgivings of counsel, from information leaking out of the jury room, the defendant might see that the jury would convict him, and absent himself until the verdict was rendered, and thus have its rendition made entirely nugatory by his own act.

The forfeiture of the bond is nothing. Appearance at the next term would save his bail, and trivial costs only would be the penalty paid, while the whole case must be tried again or the defendant be discharged altogether.

A second trial at the next term could be made at his option to result in the same way at the same trivial costs and so on *ad infinitum*. Can this be the law? We think that it cannot be as certain as that it ought not to be.

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It ought not to be, because it would put it in the power of defendants on bail to block their conviction for felonies forever; it cannot be, because the very object of all criminal law is punishment for crime, and without verdicts there can be no punishment for crime. To hold then that the law-making power in framing laws to put down crime had so framed them as to put it in the power of every criminal, rich or influential enough to procure bail, to protract the end of his trial forever, is to render the whole frame-work in respect to bailable offenses nugatory, and to stultify the legislators who made such laws. Bail is a constitutional right, guaranteed in the fundamental law, and in such cases and on charges like this it cannot well be denied; but it were better to abolish this great right than to permit such consequences to flow from it. It is wisdom to maintain the right intact, and yet to hold, as the reasoning of this court guides us in the *Nolan* case in 55 Ga., that the partaker of this privilege and recipient of this right being free, cannot defeat justice by using his freedom so as to defeat it. It may be that technically he is considered in the custody of his bail, but really he is at liberty until his bail shall deliver him up. The very object of the recognizance is to break the shackles of his confinement and let him go at large.

In some cases in other States it may have been ruled that verdicts so rendered in the absence of defendants out on bail should be set aside; but in this State it has not been so decided. The opinion of Judge WARNER, in the *Nolan* case in 53 Ga. is to be read in the light of the facts of that case. The defendant was in jail; and the evident modification in the same case in 55 Ga. of the utterances in 53 Ga., Judge WARNER being still chief justice, shows that his language in 53 Ga. applied to that case and such cases where the defendant could not exercise his right to be present because he was in jail.

The presence of the defendant is necessary for himself, mainly in order to exercise his right to poll the jury. In this case his counsel, one of them, was present and could have demanded that it be done, and it would have been done. Indeed he was asked by the court what he had to say, and he replied "nothing." So that we cannot see how the defendant was hurt in this case in any view of it.

Any arrangement he had made with a private person to let him

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know when the jury would be ready to deliver the verdict, and the failure of such person to comply with his promise, cannot affect the point. It was his duty and obligation in his bond, as well as his right, to be present until the close of his trial — the rendition of the verdict; and being free, it was for him to provide so as to be present.

No advantage was taken of him, so far as the record discloses the facts; he was called according to law, he failed to respond, and the court forfeited his recognizance and received the verdict.

According to our judgment the ruling of the Superior Court that the verdict stand is right and must be affirmed.

We append the cases cited by the counsel:

For plaintiff in error: 53 Ga. 137; 55 id. 521; 59 id. 514; 39 id. 718; 43 id. 725; 7 Ohio, 181; 4 Humph. 254; 53 Miss. 363; 5 Ark. 431; 1 Conn. 90; 19 Grat. 662; 12 Ga. 25; 7 Ala. 259; 2 Snead, 549; 3 Cald. 97; 7 id. 338; 67 N. C. 283; 25 Wis. 172; 43 N. Y. 3; 2 Fla. 502; Mag. Wis. R. Crim. Law, 501; *Bonner v. State*, 67 Ga. 510.

For the State: 55 Ga. 521; 16 Ind. 357; 36 Miss. 531; 49 id. 716.

Judgment affirmed.

It is alleged in the first paragraph that on the 18th day of March, 1878, the plaintiff purchased of the defendant, at the price of \$6,000, the furniture and fixtures of the Circle House, a hotel in Indianapolis, then and theretofore owned and conducted by the defendant, and at the same time accepted of the defendant a lease of the hotel and premises for the term of five years, commencing May 1, 1878, with the privilege of a renewal for a second and third term of five years each, at an annual rental of \$6,000. A copy of the lease is set out in the body of the paragraph. It contains a number of stipulations in reference to underletting, repairs, insurance, forfeiture, and the like matters, relevant to the occupation and use of the leasehold, among them the following, which is emphasized by counsel, to wit :

Ninth. It is agreed that the lessor shall retain at her pleasure the furniture in rooms Nos. 6 (private parlor), 7 and 11 in said hotel, and the use of rooms Nos. 7 and 11 without charge ; and that she and one other person (a son) shall be boarded by said lessee during the continuance of this lease without charge.

It is further averred :

"That at the time of purchasing the said furniture and of leasing said hotel by the plaintiff of and from the defendant, in consideration that the plaintiff would purchase said furniture and lease said property for the term of five years, with the privilege of renewal, at the rental of \$6,000 per annum, payable in installments of \$500 per month, the said defendant agreed to and with the plaintiff, verbally, that she would not, at any time thereafter, permanently establish, open, or keep, or cause to be kept, a hotel in the city of Indianapolis. * * And further in consideration of said leasing of said property by said defendant to said plaintiff, and of the purchase of said hotel furniture by him, the defendant further agreed to remain and board at said hotel, and to use her influence to aid in retaining the guests of the house, and their patronage, for the plaintiff, at said hotel ; and but for such understanding and agreement, this plaintiff would not have purchased said furniture, nor opened a hotel in Indianapolis."

It is next made to appear that the defendant, in violation of her agreement, after the plaintiff commenced business, erected close to and adjoining the Circle House another hotel, which she opened in August, 1879, and from thence carried on as a public hotel called "Circle Park Hotel," in opposition to the "Circle House ;" that

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she did not remain with the plaintiff and use her influence to induce guests to patronize his hotel, but removed to her own hotel, and endeavored to, and did draw away from the plaintiff great numbers of guests, patrons and customers of the "Circle House;" that she adopted the name "Circle Park Hotel" for the purpose of deceiving the public and drawing them to her own hotel; that she further has placed upon the front of her own hotel the name "Circle Park Hotel," and also the name "Rhodius," whereby many people and patrons and guests of the Circle House have been and will be deceived and drawn to her hotel, who otherwise would have become guests and patrons of the plaintiff's hotel; that she has also advertised her hotel under the name aforesaid, and has by this and other means greatly injured the plaintiff, whereby his patronage has been greatly lessened and diminished; his leasehold has been rendered of but little value as a hotel, which by the terms of his lease he is prevented from using for any other purpose; and his business has been greatly injured and destroyed, to his damage in the sum of \$20,000, for which he prayed judgment, and all proper, including injunctive, relief.

The second paragraph states, in addition to the main facts set forth in the first, that the defendant, to induce him to buy the furniture and take the lease, falsely and fraudulently represented that she wished and intended to retire from business and remain in the hotel and live on her income, and did not intend to, and would not, carry on a hotel if he would buy the furniture and lease the hotel, and that he should have the good-will and her influence; and that to give color to her false and fraudulent representations, she reserved the rooms, etc., as set out above; that as a fact, at the time of making these statements, she did intend to open and carry on another hotel, in case she succeeded in inducing plaintiff to buy the furniture and take the house, and to withdraw from him the patronage of her old customers and patrons; that he believed her statements to be true, and fully relied thereon, and so closed the transaction, without which he would not have done so; that soon after he took possession, she left his hotel, opened another quite adjacent, used all her endeavors to, and succeeded in withdrawing to herself the custom and patrons of the Circle House, and has so continued and intends to continue to maintain a rival hotel, thereby damaging him, etc.

The only question under the first paragraph which counsel have discussed is whether or not the alleged parol agreement was merged in the written lease.

Counsel for the appellee insist that the paragraph "undertakes to set up a contemporaneous parol agreement to control the terms of the written lease, in violation of the familiar rule that 'when a contract has been finally committed to writing all prior negotiations and stipulations between the parties are merged in that writing, and to that alone can the court refer to find what are the rights and obligations of the parties.'" Besides the texts of Greenleaf and Phillips (1 Greenl. Ev., §§ 275, 285; 2 Phil. Ev.—C. H. & E. notes—pp. 558, 593), they cite *Irwin v. Lee*, 34 Ind. 319; *Kieth v. Kerr*, 17 id. 284; *Durland v. Pitcairn*, 51 id. 426; *McClure v. Jeffrey*, 8 id. 79; *Johnson v. McCabe*, 37 id. 535; *French v. Turner*, 15 id. 59; *Oiler v. Gard*, 23 id. 212; *Coleman v. Hart*, 25 id. 256; *Cincinnati, etc., R. Co. v. Pearce*, 28 id. 502; *King v. Enterprise Ins. Co.* 45 id. 43; *Smith v. Dallas*, 35 id. 255; *Bingham v. Rogers*, 6 W. & S. 495; 40 Am. Dec. 581; *Small v. Quincy*, 4 Greenl. 497; *Hamilton v. Wagner*, 2 Marsh. (Ky.) 331; *Smith v. Williams*, 1 Murph. 426; *Mumford v. McPherson*, 1 Johns. 414 (3 Am. Dec. 330); *Van Ostrand v. Reed*, 1 Wend. 424; *Turner v. Cool*, 23 Ind. 56; *Lazear v. National Union Bank*, 52 Md. 78; s. c., 36 Am. Rep. 355; *Loxley v. Heath*, 1 DeG., F. & J. 489. And upon the doctrine that the consideration of a deed or contract may be shown by parol, they make a distinction. They say: "The language of a deed with reference to the consideration is not contractual; it is merely by way of a recital of a fact, viz., the amount of the consideration, and not at all an agreement to pay it—and such recitals of fact may be contradicted. 1 Greenl. Ev., § 385. But the very moment the stipulation as to the consideration in a deed becomes contractual, and there is either a direct and positive promise to pay the consideration named, or an assumption of an incumbrance which becomes binding on the grantee by its acceptance, then the ordinary rules with reference to contracts apply, and the consideration expressed in a deed can no more be varied by parol than any other portion of a written contract. *Hubbard v. Marshall*, 50 Wis. 322; *Van Wy v. Clark*, 50 Ind. 259."

Not disputing the general rule that parol testimony cannot be received to vary, contradict, add to or subtract from the terms of a valid written instrument, counsel for the appellant argue that the

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case is not within the rule; that the parol contract declared on is a separate contract, collateral only to the lease, in no manner tending to modify or affect any stipulation in the lease or right or obligation created by it; that the parol promise of the defendant was made in consideration that the plaintiff would purchase the hotel furniture and accept the lease of the hotel itself on the terms named in the writing, and otherwise than this, is an independent contract. We concur in this view.

The cases are numerous in which this court has recognized and declared the admissibility of parol evidence to show the real consideration of a deed, mortgage or other written contract, whether in form unilateral or *inter partes*, and that the consideration may be shown to have been different from that expressed in the writing. See *McMahan v. Stewart*, 23 Ind. 590; *Carter v. State*, 82 id. 405; *Shirts v. Irons*, 37 id. 98; *Heller v. Crawford*, id. 279; *Frederick v. Devo*, 15 id. 357; *Harris v. Harris*, 69 id. 181; *Peabody v. Peabody*, 59 id. 556; *Norman v. Norman*, 11 id. 288; *Rockhill v. Spraggs*, 9 id. 30; *Thompson v. Thompson*, id. 323; *Jones v. Jones*, 12 id. 389; *Mather v. Scoles*, 35 id. 1; *Carver v. Louthain*, 38 id. 530; *McDill v. Gunn*, 43 id. 315; *Robinius v. Lister*, 30 id. 142; *Pitman v. Conner*, 27 id. 337; *Stearns v. Dubois*, 55 id. 257; *Heavilon v. Heavilon*, 29 id. 509; *Harvey v. Million*, 67 id. 90; *McCracken v. Hall*, 7 id. 30.

The proposition of counsel for the appellee, that when the consideration expressed is "contractual," it "can no more be varied by parol than any other portion of a written contract," is true, but not to the extent which counsel seem to claim.

If A. and B. bind themselves in writing by mutual promises, saying nothing of any other consideration, it is clear that nothing can be shown by parol to vary the meaning or force of the promise of either party; nevertheless, it may be shown that in consideration of the making of the written contract A. surrendered, or agreed by parol to surrender, for cancellation, an obligation which he held against B. The contract made, the promise given by either party, as expressed in the writing, cannot be modified; but further or additional consideration may be shown, even though it consist of a promise of one party to the other, if it be to do something outside of and so far distinct from the written promise or contract as that the latter is not varied or modified.

The case before us however does not, strictly speaking,

involve proof of an additional consideration for the written lease beyond that expressed therein. On the contrary, the consideration of the parol promise sued on is shown to have been the lease itself and the purchase by the appellant of the hotel furniture and fixtures. In the language of the complaint: "In consideration that the plaintiff would purchase said furniture and lease said property," etc., "the said defendant agreed to and with the plaintiff, verbally," etc. This is clearly a collateral undertaking, which in no manner restricts or enlarges any stipulation of the lease, or any obligation of either party, in respect to the subject-matter of that instrument. If at the same time the lease was made the parol agreement had been reduced to writing, in a separate instrument, and signed by the parties, it would be regarded as a collateral contract, not necessary to be referred to in any pleading based upon the lease; and it is no less a separate and collateral contract because made by parol.

There is, as we conceive, no more reason for saying that the written lease excludes the proof of the alleged parol promise, than that it would also exclude proof of the contract for the sale of the furniture, if there had arisen a dispute between the parties in reference to that contract; as for instance if the plaintiff had claimed that he did not get possession of all the articles purchased. If the agreement not to keep another hotel is merged in the lease, it may just as well be said that the contract for the sale of the furniture is likewise merged. That such collateral agreements may be enforced has been often judicially declared.

The following cases are cited by counsel as being more or less in point: English: *Morgan v. Griffith*, L. R., 6 Exch. 70; *Lindley v. Lacey*, 17 C. B. (N. S.) 578; *Davis v. Jones*, 17 C. B. 625; *Wallis v. Littell*, 11 C. B. (N. S.) 369; *Pym v. Campbell*, 6 Ellis & B. 370; *Harris v. Rickett*, 4 H. & N. 1; *Brady v. Oastler*, 3 H. & C. 112; *Malpas v. London, etc., R. W. Co.*, 1 H. & R. 227; *Allen v. Pink*, 4 M. & W. 140; *Jeffery v. Walton*, 1 Stark. 213; *White v. Parkin*, 12 East, 578; *Erskine v. Adeane*, L. R., 8 Ch. Ap. 756 (s. c., 6 Moak's Eng. R. 594); *Angell v. Duke*, L. R., 10 Q. B. 174 (s. c., 12 Moak's Eng. R. 236 and n); *Mann v. Nunn*, 43 L. J. C. P. 241. American: *Harvey v. Milhon*, 67 Ind. 90; *Doty v. Martin*, 32 Mich. 462; *Pierce v. Woodward*, 6 Pick. 206; *Hubbard v. Marshall*, 50 Wis. 322; *Frey v. Vanderhoof*, 15 id. 397; *Ballston Spa Bank v. Marine Bank*, 16 id. 120; *Jones v. Keyes*, id. 562; *Hahn v.*

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Doolittle, 18 id. 206; *Miller v. Fichthorn*, 31 Penn. St. 252; *Fiske v. McGregory*, 34 N. H. 41; *Coates v. Sangston*, 5 Md. 121; *Knight v. Knotts*, 8 Rich. (Law) 35; *Phillips v. Preston*, 5 How. 278; "*Joannes*" v. *Mudge*, 6 Allen, 245; *Weaver v. Wood*, 9 Penn. St. 220; *Powellton Coal Co. v. McShain*, 75 id. 238; *Shughart v. Moore*, 78 id. 469; *Barry v. Ransom*, 12 N. Y. 462; *Wilbeck v. Waine*, 16 id. 532; *Kernochan v. New York Bowery F. Ins. Co.*, 17 id. 428; *Silliman v. Tuttle*, 45 Barb. 171; *Hutchings v. Hebbard*, 34 N. Y. 24; *Hope v. Balen*, 58 id. 380; *Lewis v. Seabury*, 74 id. 409; s. c., 30 Am. Rep. 311; *Chapin v. Dobson*, 78 N. Y. 74; s. c., 34 Am. Rep. 512, in which the case of *Morgan v. Griffith*, and others, cited above are followed.

Mr. Stephen, in his digest of the Law of Evidence, after stating the rule that oral evidence is inadmissible to contradict, alter, add to or vary the terms of a written contract, grant or other disposition of property, adds five exceptions, the second being as follows:

"2. The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them." Art. 90.

In discussing this rule Taylor, in his treatise on the Law of Evidence, says: "The rule does not prevent parties to a written contract from proving, that either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter. Still less, as will presently be shown, does the rule exclude evidence of an oral agreement, which constitutes a condition on which the performance of the written agreement is to depend." § 1038.

Again the same author says: "It is almost superfluous to observe, that the rule is not infringed by proof of any collateral parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter." § 1049.

Greenleaf says: "Nor does the rule apply in cases where the original contract was verbal and entire, and a part only of it was reduced to writing." 1 Greenl. Ev., § 284a.

ERLE, C. J., in *Lindley v. Lacey*, *supra*, states the rule thus: "If the instrument shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted

to introduce a term which does not appear there. But if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced. In some of the cases,—as in *Harris v. Rickett*, 4 Hurlst. & N. 1,—there was a prior verbal agreement. In *Davis v. Jones*, 17 C. B. 625, the oral and the written agreement were contemporaneous. So in *Wallis v. Littell*, 11 C. B. (N. S.) 369, there was a contemporaneous oral agreement. * * * It is clear therefore that if there be a distinct collateral oral agreement between the parties, it is immaterial whether it precedes or is contemporaneous with the written agreement.”

In *Erskine v. Adeane*, *supra*, MELLISH, L. J., said : “No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterward reduce it to writing, verbal evidence will not be admitted to introduce additional terms into the agreement ; but nevertheless what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself.”

In *Shughart v. Moore*, 78 Penn. St. 469, the tenant sued the landlord, averring, in substance, that the landlord agreed with him if he would tend a certain farm on the shares, he, the landlord, would build a barn for his use by harvest, and that he failed to do so, to his damage. SHARSWOOD, J., in reversing the case, said : “The cases of *Weaver v. Wood*, 9 Barr, 220, and *Powelton Coal Co. v. McShain*, 25 P. F. Smith, 238, are full to the point that the offer of evidence complained of in the first assignment of error ought to have been received. These cases settle beyond all question that where a promise is made by one party in consideration of the execution of a written instrument by the other, it may be shown by parol evidence.”

In the last edition of Taylor on the American Law of Landlord and Tenant, after stating the general rule, it is said : “But distinct and separable provisions, whether contemporaneous with or prior to the execution of a deed or written lease, will not be merged therein if clearly collateral.” § 44. Also see cases of *Chapin v. Dobson*, *supra* ; *Angell v. Duke*, *supra* ; *Mann v. Nunn*, *supra*.

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We regard these as sound and accurate declarations of a principle, entirely consistent with and involving no invasion of the general rule which forbids the admission of parol testimony to vary a writing.

It may be, that upon the facts of some of the cases cited and quoted from, we would agree with counsel for the appellee that the parol evidence offered and admitted ought to have been excluded as inconsistent with the written agreements of the parties ; but however this may be, the case before us is a clear one, and involves no departure from established principles.

The case of *Welshbillig v. Dienhart*, 65 Ind. 94, is urged upon our attention by the appellee ; but conceding the case to be well decided, we do not consider it at all in the way of our present conclusion. The parol agreement there set up was for certain improvements and repairs upon the leased premises, and so the court said of the plea : "It seeks to change a written contract by a verbal contract previously made." The written and parol contracts in that case were concerning the same subject, the leased property ; while in the present case they have no connection, except that the parol agreement was made in part in consideration of, that is to say, for the sake of, procuring the execution of the lease. See, in this connection, *Wilson v. Deen*, 74 N. Y. 531, which in principle is not unlike *Welshbillig v. Dienhart*, *supra*, and recognizes the distinction which we make between that case and this one.

Upon the authority of *Kieth v. Kerr*, *Irwin v. Lee*, *supra*, and other cases, it is claimed that it must appear on the face of the written contract that it is incomplete, in order that parol testimony may be admitted for the purpose, not of contradicting what is expressed, but of showing the whole contract. This we do not dispute but do not deem it applicable here, where the effort is not to add any thing to, or to supply any omission in, the lease. That instrument seems to be as the parties intended to make it ; and the alleged parol agreement is so far separate that either may be enforced without effect upon the other.

To illustrate further the collateral character of this agreement, let us suppose that instead of the appellee it had been a third person, who, upon consideration of the acceptance of this lease and purchase of the hotel furniture of the appellee by the appellant, had promised to retire and refrain from keeping hotel in Indianapolis. It is too clear for argument that such an agreement, though

resting on the same consideration as the one pleaded, would be distinct from the lease, and could not be deemed to vary or affect in any way the terms of that instrument. The two agreements are no less distinguishable from each other because both made between the same parties. Counsel do not, as we understand them, deny that if the appellee had conveyed the property in fee to the appellant, specifying in the deed the price in money paid or agreed to be paid, it would have been competent to show such additional agreement, by parol, as is alleged; and the fact that an estate for years was created by a lease, wherein the payment of rent and other matters appropriate to be found in such a writing are provided for, and the lease signed by both parties, does not seem to us to make the case essentially different in this respect.

[Omitting a minor question.]

Judgment reversed, with instructions to overrule the demurrer to the first paragraph of the complaint.

Judgment reversed.

ELLIOTT, J., did not participate in this decision.

Petition for a rehearing overruled.

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(87 Ind. 186.)

Sunday — legal advertisement in Sunday newspaper.

The publication of a sheriff's notice of sale in a Sunday newspaper is invalid.

ACTION for injunction. The opinion states the case. The defendant had judgment below.

W. F. Severson, for appellant.

J. L. Miller, for appellees.

ELLIOTT J. The appellant's complaint seeks an injunction to prevent the sale of real estate upon execution, and asserts a right to this relief upon the ground that the notice of the sale was published in a Sunday paper.

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The validity of what is commonly called the Sunday law is no longer an open question; its validity was affirmed in an early case, and this holding has been again and again approved. *Johns v. State*, 78 Ind. 332; s. c., 41 Am. Rep. 577.

The case is governed by our statute; for as we have a statute upon this subject, the common law does not prevail. The question therefore is whether the act is one fairly within the operation of our Sunday law.

The sheriff is charged with the duty of giving due notice of sales, and the performance of any ordinary act connected with one's business or profession is usually considered an act of common labor. It would certainly not be proper for the sheriff to keep open his office on Sunday for the transaction of ordinary business; nor to make sales on executions on that day; nor to go about the country making levies on property. Extraordinary acts, or acts outside of the usual and ordinary course of the business of his office, may be done, because such acts cannot be justly regarded as done in the discharge of the duties of his vocation. Advertising sales cannot be said to be an extraordinary act, or one not within the usual vocation of the sheriff; on the contrary, it is one of the principal duties of his ordinary business. It would be strangely inconsistent to allow a sworn officer of the law to do an act within the line of his ordinary official duties on Sunday, and yet punish a cigar seller or a vendor of goods for transacting his business on that day. It is clear on principle that the sheriff cannot transact on Sunday the ordinary business of his office, but authorities are not wanting. In *Smith v. Wilcox*, 24 N. Y. 353, it was held that a contract for the publication of an advertisement in a Sunday newspaper was void under the provisions of a statute not unlike ours, and many cases are cited sustaining the holding. The court, in the course of the opinion, said: "The plaintiffs necessarily, in the performance of their agreement by the publication of the advertisement, violated the letter as well as the spirit of the act prohibiting the exposure of merchandise for sale on Sunday, and no action will lie upon such contract. In a sense it was a contract by the plaintiffs for the performance of servile work on the Sabbath. They agreed to publish and circulate the advertisement of the defendants on Sunday by delivering a copy to each of their customers who should buy of them a copy of their paper; and incidentally they agreed to expose for sale and sell on that day their paper containing the

advertisement. This was servile work in the same sense that the service of the attorney's clerk was, or that of a salesman in a dry goods store would be."

The publisher of a Sunday paper undertakes to circulate his paper on that day to subscribers and customers, and as the publishing of such a paper is his vocation, it necessarily follows that he engages in it when he circulates the paper owned by him. It would be a perversion of all principle to permit a sheriff to aid in the violation of a statute by employing the violator to publish legal notices, for we should then have the singular anomaly of the chief ministerial officer of the county encouraging the violation of a law which it is his sworn duty to enforce. More directly in point than the case just commented on is that of *Scammon v. City of Chicago*, 40 Ill. 146. In that case it was held that a legal notice published in a Sunday newspaper was void, the court saying of the notice and publication that "To permit it to be given on Sunday is against the spirit and policy of our law. A large and most respectable portion of the community consider it immoral to issue Sunday papers, and if these notices should be published in such papers only, property holders entertaining these opinions would have little chance of learning of the assessment." In the case of *Shaw v. Dodge*, 5 N.H. 462, the court said: "It is not doubted, that the serving of civil process falls within the prohibition, is unlawful and can not be justified, if done on the Lord's day." In *Butler v. Kelsey*, 15 Johns. 177, it was held that a writ of inquiry of damages cannot be executed on Sunday. The case of *Stern's Appeal*, 64 Penn. St. 447, decides that an order given to the sheriff on Sunday is illegal. Our own case of *Kiger v. Coats*, 18 Ind. 153, holds that the delivery of an award on Sunday is not invalid; but that case is expressly put upon the ground that such an act is not within the ordinary vocation of the arbitrator, and the decision is therefore not in point in a case where the act clearly appears to be within the ordinary line of one's duty or profession. An officer has no more right than a private citizen to do an act in violation of law, and an ordinary official act which can be done upon one day as well as another, without endangering the rights of any person, is an act in violation of our Sunday law. The fact that the sheriff directed the publication of the notice does not make the act of publishing it a lawful one. An act done in violation of a statute cannot be made lawful by the direction of an officer, and it would be a solecism to

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affirm that an act done in violation of law constitutes a legal notice.

The printing of a newspaper is not all that is done by its owner; that is indeed work that may be done on a day other than Sunday; but the circulation of the paper, its delivery to subscribers, its sale to newsboys or customers, are things that are necessarily done on Sunday. The circulation is the most important part of the whole work of conducting the paper, for it secures readers for the advertisements, and profits, or at least compensation to the owner of the paper. The chief consideration in a contract for the publication of a legal advertisement is that the paper in which it is published shall be generally circulated and readers secured. The owner of a Sunday paper is pursuing his ordinary vocation when he is engaged in circulating his paper, and he who engages in his ordinary vocation on that day transgresses the law. Many cases declare that an act of ordinary business performed on Sunday is unlawful. Among these cases enforcing and illustrating this principle are, *Link v. Clemmens*, 7 Blackf. 479; *Pate v. Wright*, 30 Ind. 476; *McCarthy v. State*, 56 id. 203; *Mueller v. State*, 76 id. 310; s. c., 40 Am. Rep. 245; *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; s. c., 41 Am. Rep. 558.

A single case is cited by appellee, and that we do not regard as authority, for it is the decision of a *nisi prius* court, is not sustained by the adjudged cases, and the reasoning of the judge by whom the decision was made is unsatisfactory and inconclusive.

Judgment reversed.

AYERS V. BURNS.

(87 Ind. 245.)

Infancy — note for necessities.

A surety on an infant's note given for necessities, having been compelled to pay it, cannot maintain an action against the infant for reimbursement during his infancy.

ACTION by surety for reimbursement. The opinion states the case. The plaintiff had judgment below.

C. Foley, for appellants.

L. M. Campbell and *J. T. Burns*, for appellee.

Howe, J. This was a suit by the appellee, administrator of the estate of Mary Ayers, deceased, against the appellants, Gardner Ayers, an infant, and Jonathan H. Johnson, guardian of such infant's person and estate. The appellants jointly answered by a general denial of the complaint. The issues joined were tried by the court, and at the appellants' request, the court made a special finding of the facts, and stated its conclusions of law thereon, in substance, as follows :

"1st. That on the 2d day of November, A. D. 1878, defendant Gardner Ayers was under indictment by the grand jury of Hendricks county, State of Indiana, charged with the crime of murder in the first degree (the murder of his father), and was in the custody of the sheriff of said county, under arrest on said charge, and was arraigned on said charge and was compelled to go to trial thereon, in the Circuit Court of said county, and it was necessary for his proper defense to said indictment that he should have counsel to defend him ; and that defendant Gardner Ayers, together with his mother Mary Ayers, now the plaintiff's decedent, on the 2d day of November, A. D. 1878, executed the two promissory notes mentioned in the complaint, each being for two hundred and fifty dollars, payable two months after said day, with interest at the rate of ten per cent per annum, and ten per cent attorneys' fees, one payable to the order of Leander M. Campbell, and the other to the order of John T. Burns, attorneys at law of said court.

"2d. That the sole consideration for the execution of the said notes was the agreement and undertaking of the said attorneys to defend the said Gardner Ayers against the said indictment and charge of murder ; and that said attorneys, pursuant to said agreement, did defend said Gardner Ayers, in said court, against said indictment and charge before a jury, and he was acquitted as to said charge, such defense being necessary.

"3d. That at the time of the execution of the said notes the said Gardner Ayers was and still is an infant, being under and less than twenty-one years of age, and that defendant Jonathan H. Johnson is the guardian of the person and property of the said Gardner Ayers.

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"4th. That said Mary Ayers executed said notes only as surety for said Gardner Ayers, and has since died ; and plaintiff, John T. Burns, was duly appointed as the administrator of her estate, and qualified as such, and as such administrator has been compelled to pay off said notes out of the assets of her estate, amounting at the time of payment to the sum of \$590, none of which sum has been repaid him.

"5th. And that said Jonathan H. Johnson, as such guardian, has assets in his hands, belonging to his said ward, sufficient to repay said sum in whole or in part. "

Upon the foregoing facts the court stated its conclusions of law, as follows :

"That the defendant Gardner Ayers is liable and indebted to the plaintiff in the sum of \$590, so paid by the plaintiff on said notes, as stated in the facts found above, and that judgment should be rendered against him for said sum, and that the assets in the hands of the said Gardner Ayers are liable for the payment of said indebtedness and the judgment to be rendered thereon, and it is proper for the court to order said guardian so to apply them. "

"To which decision of the court upon the law involved the defendants severally except. "

The court rendered judgment against the appellants, in accordance with its conclusions of law, from which judgment they have appealed to this court, and have severally assigned as error that the trial court erred in its conclusions of law upon the facts specially found.

We are of the opinion that the facts found by the court did not authorize its conclusions of law. The suit is founded upon an implied contract of the appellant Ayers to repay the money which the administrator of his surety had been compelled to pay on his promissory notes. Such an implied contract, if it existed, was not binding and could not be enforced against him during his infancy. Indeed, it may well be doubted if his promissory notes, even though given for necessities, could have been enforced against him during infancy in suits thereon by the payees thereof. In *Henderson v. Fox*, 5 Ind. 489, it was said : "The rule deducible from all the authorities is, that the only contract binding on an infant is the implied contract for necessities. Express contracts, as by bond or note, are not as such binding, and cannot be enforced without ratification, even if given for necessities. For whether the articles

furnished were in the particular case necessities, is a question of law, to be determined by the court. And if deemed necessities, then their quantity, quality, and reasonable price, is for the consideration of the jury. But if on the contrary the express contracts of infants, even when necessities, so called, were the considerations could be enforced, these important questions might be improvidently settled by the infant himself, beyond the supervision of the courts."

So in *Tyler on Infancy* (2d ed.), p. 111, it is said: "It would seem that the promissory note given by an infant for necessities has no obligatory force as such." In *Price v. Sanders*, 60 Ind. 310, it is said: "'Necessaries,' in the technical sense, means such things as are necessary to the support, use or comfort of the person of the minor, as food, raiment, lodging, medical attendance, and such personal comforts as comport with his condition and circumstances in life, including a common-school education." It was there said that an infant cannot be held liable at law on his note or other contract for money, even though he expends the money for necessities. There are many decisions of this court to the effect that an infant's contract is voidable, and may be avoided by him during his infancy, or on his arrival at full age. *Pitcher v. Laycock*, 7 Ind. 398; *Miles v. Lingerman*, 24 id. 385; *Briggs v. McCabe*, 27 id. 327; *Fetrow v. Wiseman*, 40 id. 148; *Carpenter v. Carpenter*, 45 id. 142; *Towell v. Pence*, 47 id. 304; *Dill v. Bowen*, 54 id. 204; *Reish v. Thompson*, 55 id. 34; *Indianapolis, etc., Co. v. Wilcox*, 59 id. 429.

We have found no authority however in the reported decisions of this court or of other courts of last resort, for holding that an infant is liable upon such an implied contract or promise as the one in suit in the case at bar. We are constrained to hold therefore as we do, that the court erred in its conclusions of law upon the facts specially found, and that for this error the judgment below must be reversed. We are not prepared to say that the appellee might not recover of the infant in a proper case such reasonable sum as would be equal to the just value of the attorneys' services in the defense of such infant. But in this case there was no finding by the court of the just value of the attorneys' services, which were found to be necessary, or indeed that they were of any value. What we decide is that the special finding of facts by the court in this case did not authorize its conclusions of law.

The judgment is reversed with costs, and the cause remanded

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with instructions to set aside its conclusions of law, and in lieu thereof as its conclusions of law, to find for the appellants, the defendants below, and render judgment accordingly.

Judgment reversed.

CITY OF EVANSVILLE V. MORRIS.

(87 Ind. 260.)

Sunday — official bond executed on.

An official bond signed and delivered on Sunday by a surety to the principal, and delivered by the principal to the proper custodian on a secular day, binds the surety.

ACTION on an official bond. The opinion states the case. The defendant had judgment below.

C. Denby and D. B. Kumler, for appellant.

P. Maier and J. M. Shackelford, for appellees.

BEST, C. This action was brought by the appellant upon the official bond executed to it by William G. Whittlesey, as secretary of the water-works of the city, and by David Elkins and Frank Morris as his sureties. The condition of the bond was that Whittlesey should pay over to the city all sums of money that should come into his hands as such secretary, the breach assigned was that after its execution, and after he had entered upon the discharge of his duties, he received as such secretary the sum of \$723.04 from various persons, and although said sum had been demanded of him and his sureties, and although it was due and unpaid, he and they failed and refused to pay it.

Whittlesey made default, and the other appellees answered separately. Each answer contained two paragraphs. The first paragraph of each was precisely alike. The answer of Frank Morris was as follows: "Frank Morris, for his separate answer, says that he admits signing the bond in the complaint

mentioned, but says he did not sign said bond on the 15th day of April, 1878, the day it bears date, but that he signed the same and delivered it to his co-defendant, Whittlesey, on the 14th day of April, 1878, which was the first day of the week, commonly called Sunday, and not any other or different day, and that such signing and delivering were the only acts done by him at the time of the execution of said bond." A demurrer for the want of facts was overruled to each of these paragraphs, and an exception reserved.

A reply in two paragraphs was filed to the first paragraph of each answer. The first paragraph of the reply was in substance as follows: The plaintiff avers that there existed in the city of Evansville, on the 1st day of April, 1878, what was known as the City Water-Works, by which the city and its citizens were supplied with water; that the water-works were under the management of the common council, a secretary and superintendent of the water-works that among the duties of the secretary were the collection of water rents and revenues, and the payment of them to the city treasurer that the secretary received a salary, and before entering upon his duties was required to give his bond to the city, with sureties, in the sum of \$5,000, which it was the duty of the mayor or common council to approve; that on the 8th day of April, 1878, Whittlesey was appointed secretary of the water-works by the common council of said city, as his sureties well knew; that he was required to give bond, as his sureties well knew, and that the bond was necessary in order to enable Whittlesey to get control of the office to which he had been appointed, as his sureties knew; that they knew it was necessary to have the bond approved by the mayor or common council, and knew the bond was dated Monday, the 15th day of April, 1878, the day it bore date; that they knew the mayor or common council would not approve the bond if executed or dated on Sunday; that they knew that Whittlesey, on some subsequent secular day would deliver the bond to the mayor or common council who would approve the same on presentation, because the mayor and city clerk knew the signatures of the sureties, and that they were men of wealth worth \$15,000 each; that the sureties, knowing all these facts, and for the purpose of enabling Whittlesey to take possession of the office to which he had been appointed, signed the bond on Sunday and gave it to Whittlesey, who on the day following, Monday, the 15th day of April, 1878, the day of the date of the bond, delivered the same to the mayor, who being acquainted

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with the signatures and financial ability of the sureties, approved the same; that Whittlesey immediately entered upon the discharge of his duties as secretary of the water-works, and was thereby enabled to embezzle the money of the city; that plaintiff had no knowledge that the bond was executed on Sunday until a few days before the bringing of this suit; that by reason of the sureties signing said bond and putting it into the hands of Whittlesey, and by reason of the representations contained in the bond, the plaintiff believed it to be a good and sufficient bond, acted upon it with that belief, and permitted Whittlesey to assume control of the office and to remain in possession thereof; that the plaintiff relied upon the bond, and would have refused to permit Whittlesey to exercise control of the office had it known the foregoing facts, and had it not been that such facts were concealed from the plaintiff.

A demurrer for the want of facts was sustained to each paragraph of the reply and the appellant declining to further plead, final judgment was rendered for the appellees.

The errors assigned are that the court erred in overruling the demurrer to the first paragraph of each answer, and in sustaining the demurrer to each paragraph of the reply.

The question raised by the first assignment is whether a bond dated on Monday, but which was signed by a surety on Sunday, and on that day delivered by him to the principal therein, who afterward on a secular day delivers it to the obligee who accepts it without notice of such facts, binds the surety. The delivery of the bond to the principal after the surety has placed his name upon it as a rule authorizes the principal to deliver it to the obligee, for such is the channel through which the paper would properly pass in reaching the obligee. *Deardorf v. Foresman*, 24 Ind. 481.

If the delivery by the surety had been made on a secular day, no question could arise as to the authority of the principal to make the delivery to the obligee, but it was made on Sunday, and it is claimed that this fact vitiated the authority thus conferred, though the bond was not accepted until a secular day. This position is based upon the ground that the act of the surety is in violation of our statute prohibiting persons from engaging in common labor on the Sabbath day. 2 R. S. 1876, page 483. It is well settled that an instrument executed on the Sabbath day cannot be enforced, as a general rule. *Pate v. Wright*, 30 Ind. 476; *Perkins v. Jones*, 26 id. 499.

The bond in question however was not executed on the Sabbath day, as it was not accepted by the obligee until a secular day. This leads us to inquire whether the statute embraces the case. The ground upon which the courts have refused to maintain actions on contracts made on the Sabbath day is the elementary principle that one who has participated in a violation of the law cannot assert any right growing out of such illegal transaction. *Cranston v. Goss*, 107 Mass. 439; s. c., 9 Am. Rep. 45. It is said in this case that "It is upon this principle that a bond, promissory note or other executory contract, made and delivered upon the Lord's day, is incapable of being enforced, or as is sometimes said, absolutely void, as between the parties. *Pattos v. Greely*, 13 Met. 284; *Merriam v. Stearns*, 10 Cush. 257; *Day v. McAllister*, 15 Gray, 433; *Towle v. Larrabee*, 26 Me. 464; *Pope v. Linn*, 50 id. 83; *Allen v. Deming*, 14 N. H. 133; *Finn v. Donahue*, 35 Conn. 216."

The rule is thus stated in *Johns v. Bailey*, 45 Iowa, 241: "The ground of the principle upon which such a contract is pronounced invalid is the violation of the law by the parties thereto. It is *causa turpis*. The parties to the contract are *participes criminis*, and are *in pari delicto*; neither can enforce the contract, for both are violators of the law."

Again, in *Tuckerman v. Hinkley*, 9 Allen, 452, it is said: "The ground on which a plaintiff's action is defeated in such case is, that a party is not permitted to found a claim in courts of law upon his own contravention of law."

In *Sargeant v. Butts*, 21 Vt. 99, it is said that "in order to render a contract void, for the reason that it was closed on Sunday, it must appear that the party seeking to enforce it had some voluntary agency in consummating the contract on that day."

In *Dohoney v. Dohoney*, 7 Bush, 217, where a surety had signed a note on Sunday and delivered it to his principal, who afterward delivered it to the payee, the court said that there was no evidence that the note was delivered on the Sabbath day, or that the payee "participated in any violation of the statute prohibiting labor and business, * on the Sabbath day; and according to the case of *Ray v. Catlett*, 12 B. Mon. 532, and other decisions under our own and similar statutes of other States on the subject, the illegal acts of the obligors in the note did not affect its validity in the hands of the obligee, who did not himself violate the law."

In *Tuckerman v. Hinkley*, *supra*, the defendant had written a

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letter on Sunday, to the plaintiffs, requesting them to store and sell some iron for him. This request was not accepted or acted upon till Monday or Tuesday. In a suit upon the contract, it was held that as the plaintiffs did nothing in contravention of the statute the defendant's own wrong would not exonerate him from his obligation.

In *Dickinson v. Richmond*, 97 Mass. 45, a request for services was made on the Sabbath day. The request was accepted and the services rendered on a week day; and in a suit upon the contract it was held that the defendant's own wrong in making the request on the Sabbath day did not taint the contract with illegality.

These cases abundantly show that a party to a contract, who has not himself violated the law, is not precluded from enforcing such contract, and that the acceptance of a bond on a secular day, which was signed on the Sabbath, is not a violation of the law. It is also well settled that if some steps are taken toward the execution of a contract on the Sabbath day, but it is not fully consummated until a secular day, such contract is not in contravention of the statute. *Beitenman's Appeal*, 55 Penn. St. 183; *Merrill v. Downs*, 41 N. H. 72; *State v. Young*, 23 Minn. 551; *Prather v. Harlan*, 6 Bush, 185; *Commonwealth v. Kendig*, 2 Penn. St. 448. These cases conclusively show that to bring the case within the inhibition of the statute it must be shown that the contract was executed upon the Sabbath day.

This bond was not delivered upon the Sabbath day, and as it was not executed until it was delivered, it follows that it was not executed upon the Sabbath day.

In *Beitenman's Appeal*, 55 Penn. St. 183, it is said: "A bond is not perfected until delivery; hence a mere signing on Sunday does not render it void, if not delivered till the day following." The same principle exactly is to be found in *Sherman v. Roberts*, 1 Grant, 261. The contract must therefore be complete on Sunday to avoid it, and this is the rule in *Fox v. Mensch*, 3 W. & S. 446; and in *Lyon v. Strong*, 6 Vt. 219; and *Lovejoy v. Whipple*, 18 id. 379."

In *Adams v. Gay*, 19 Vt. 358, the court said: "Contracts of this kind are not void because they have grown out of a transaction upon Sunday. This is not sufficient to avoid them; they must be finally closed upon that day."

In *Lovejoy v. Whipple*, 18 Vt. 379, it is said: "In order to

avoid this contract, on the ground taken below, was it necessary that the note should have been delivered, as well as written and signed, upon Sunday ?”

The general principles announced in the foregoing cases show that to bring this case within the inhibition of the statute it must appear that the bond was executed upon the Sabbath day, and this precise point has several times been decided in suits upon bonds executed by sureties in a similar way.

In *Prather v. Harlan*, 6 Bush, 185, sureties signed their names to a bond on the Sabbath day and delivered it to their principal, who afterward delivered it to the obligee on a secular day. In a suit upon the bond the sureties insisted that it was, for such reason, void, but the court held otherwise, saying that as the bond did not become obligatory until delivered to the officer, it can not be regarded, so far as the obligee's rights are concerned, as executed on Sunday.

In *Commonwealth v. Kendig*, 2 Penn. St. 448, a surety signed an official bond on Sunday and delivered it to his principal, who thereafter, on a secular day, delivered it to the obligee ; and in a suit upon the bond the court held that the surety was bound, saying that although the act of signing the bond on Sunday exposed the surety to the penalty imposed by the statute, yet it did not avoid the bond, “for the statute can not destroy that which had no existence.”

In *State v. Young*, 23 Minn. 551, sureties had signed a county treasurer's bond on the Sabbath day and had delivered it to their principal, who delivered it to the obligee on the next Thursday, and in a suit upon such bond the sureties insisted it was void, because signed by them on Sunday. The court however held otherwise, saying that the bond was not executed until Thursday, and “the mere signing of it on Sunday does not affect its validity.”

In *Hall v. Parker*, 37 Mich. 590; s. c., 26 Am. Rep. 540, a bond was executed for costs. This bond was signed by the sureties on Sunday, delivered to the principal, and by him delivered to the court during the following week. In a suit upon this bond the sureties insisted that it did not bind them because signed on Sunday ; the court held otherwise, saying that the bond took effect on a secular day, and “the circumstance that the act of signing occurred on Sunday could not be allowed to invalidate the instrument.”

The same was decided in *Hilton v. Houghton*, 35 Me. 143, in a

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suit upon a promissory note executed by sureties in the same way. In all of these cases nothing was done by the sureties but to sign their names and deliver the several instruments to their respective principals, and the cases are therefore as we think precisely in point.

These cases clearly show that a surety who authorizes his principal on Sunday to deliver an instrument signed by the surety on that day is bound by such delivery. The reason is obvious. The authority to make the delivery, but for the statute, is ample and complete. The statute does not affect it, for the reason that it alone prohibits the enforcement of contracts executed on the Sabbath day. If otherwise, it would punish a party who has done no wrong, and would exonerate a party from a civil obligation simply because he had himself violated the law. It would thus shield the guilty and punish the innocent. This it will not do, and hence the authority to make the delivery is unaffected by the statute.

There is another and an equally cogent reason why the facts stated constitute no defense. The only thing they legally tend to show is the non-delivery of the bond. This simply questioned its execution. The execution of the bond however was admitted because it was not denied by a pleading under oath. If the answer had alleged that the bond was not signed by the appellees, or was not delivered by them personally, or by any person authorized to make the delivery, no one would pretend that such answer, in the absence of a verification, would be worth any thing. Yet this answer alleges nothing more. It is true that it does not in terms allege that the person who made the delivery had the authority to make it, but the fact from which such conclusion is drawn, viz., that the authority was given on Sunday, is averred, and this amounts to no more than an averment that the bond was delivered without authority. The admission remains that the bond was executed, and the facts averred only show that some steps were taken on Sunday toward the execution of a bond that was afterward duly executed upon a secular day. That this is not sufficient to invalidate the bond is well settled by a long and almost unbroken line of decisions in all the States where statutes similar to ours have been enacted. This answer therefore presents no question as to the execution of the bond, and hence no question arises as to its delivery, or as to the authority of the person by whom the delivery was made. All defenses of this nature are based upon the admission that the

instrument has been duly executed. If not executed it is wholly immaterial whether the appellees signed their names on Sunday, or on any other day, as such instrument will not bind them, whenever signed. The enquiry as to when the bond was signed only becomes material upon the admission that it was executed at some time. At what time is the question. If at any time other than on Sunday the statute does not render it void. It is not averred that this bond was executed on Sunday, and therefore the facts averred constitute no defense to the action.

We are aware that the case of *Davis v. Barger*, 57 Ind. 54, decides this question the other way, and that some other cases follow it; but we think the conclusion thus reached wrong, and that the case should not be followed. As the answers in question, for the reasons given, were insufficient, the demurrers should have been sustained; and for the error in overruling them the judgment should be reversed. The reply was good.

PER CURIAM. It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellees' costs, with instructions to sustain the demurrers to the first paragraph of each of the appellees' answers.

NIBLACK, J., did not participate in the decision of this cause.

Petition for a rehearing overruled.

ROBINSON V. CITY OF EVANSVILLE.

(87 Ind. 334.)

Municipal corporation — negligence of fire department.

A city is not responsible for the negligence of its fire department whereby the property of a citizen is destroyed by fire.

ACTION of negligence. The opinion states the case. The defendant had judgment below.

W. F. Smith, A. Gilchrist and A. L. Robinson, for appellant.

C. Denby, D. B. Kumler and P. Maier, for appellee.

WOODS, C. J. Action for the alleged negligence of the appellee in suffering the destruction by fire of the appellant's dwelling-

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house and other property. The complaint is, in legal effect, the same as, and in its particular averments much like that in the case of *Brinkmeyer v. City of Evansville*, 29 Ind. 187. The appellant claims a difference, because it is shown, in this instance, that relying no longer on "horse engines" and cisterns in the street, the city at great expense had adopted and constructed Holly water-works on an extensive and adequate plan, with hydrants suitably located, had organized a fire department well equipped with engines, hose, and other appliances, for the support of all which it had collected and was collecting taxes and water rents.

In respect to the fault of the city, it is alleged that the loss occurred through the neglect, carelessness and inefficiency of the fire department, as follows:

"1st. The house was about seven hundred feet from the nearest hydrant, from which plenty of water could have been had, and this hydrant was only six hundred feet from the nearest hose house known as No 6. The hose cart at this house has capacity to carry eight hundred feet of hose, but through neglect of the men of the fire department it contained only six hundred and fifty feet of hose, which was not sufficient in length to reach the fire from this hydrant. If there had been eight hundred feet the fire would have been quickly extinguished and but little damage done. This hose cart and reel arrived in good time after the alarm, but could do nothing on account of want of sufficient length of hose, and had to wait the arrival of hose carts from hose houses No. 2 and No. 9, which were three-fourths of a mile from the fire ; that the men who should have been present and fit for duty at No. 2 hose house were absent from the house and unfit for duty. The horse at said hose house No. 2 used for hauling the hose cart had been for a long time to the knowledge of the common council, and of the chief of the fire department, balky and totally unfit for use. On this occasion this horse balked, and totally refused to go for a long time, and on this account and the absence of the men from the hose house, they were delayed a long time, to wit, half an hour, and during this time the house was burned to the ground.

"2d. Owing to the neglect of the common council and of the members of the fire department, the hose used in attempting to extinguish the fire was old and worthless, and broke repeatedly under the pressure of the water.

"3d. Owing to like neglect, the hydrant used on that day was

filled with mud and sediment which was forced through the hose and caused it to break.

"4th. After the breaking the hose as above stated, the chief of the fire department and the men under him were guilty of great negligence in delaying to have the same repaired.

"5th. The chief of the fire department and the men under him were not in their places at the giving of the alarm, and were not fit for duty. They had spent the night before drinking and carousing and without sleep, and when the alarm was sounded they were away from their post of duty, drinking and carousing at the bar of a hotel, and thus were too drunk and too stupefied by intoxicating drink to count the strokes of the fire alarm bell, and part of them started and went a long distance in the wrong direction."

An elaborate and able argument has been presented to show that this case is distinguishable from *Brinkmeyer v. City of Evansville*, *supra*, and also that the decision in that case ought not to be followed. "A long time," it is said, "has elapsed since that decision was made;" and *Haag v. Board, etc.*, 60 Ind. 511 ; s. c., 28 Am. Rep. 654, and *City of Greencastle v. Martin*, 74 Ind. 449; s. c., 39 Am. Rep. 93, are cited by counsel as a proof of "progressive spirit exhibited by the court during the last decade." We are not able to perceive that these cases involve either a departure or a progression in doctrine. They are clearly distinguishable, because the damages for which relief was sought in each was the natural and proximate result of the act complained of ; while in this and in the *Brinkmeyer* case, the damages were remote, and could not with certainty be attributed to the alleged negligence of the appellee. The decision in the *Brinkmeyer* case is supported by authority, and as we think, is sound in principle. It was said in the opinion then delivered, and may be repeated now, that no case has been cited which holds a municipality liable in such a case, and if such authority or precedent exists we are not aware of it. The decisions to the contrary are numerous and consistent, and the reasoning by which they are supported is satisfactory and convincing. See the following : *Patch v. Covington* 17 B. Mon. 720 ; *Wheeler v. City of Cincinnati*, 19 Ohio St. 19 ; s. c., 2 Am. Rep. 368 ; *Fisher v. City of Boston*, 104 Mass. 87 ; s. c., 6 Am. Rep. 197 ; *Grant v. City of Erie*, 69 Penn. St. 420 ; s. c., 8 Am. Rep. 272 ; *Jewett v. City of New Haven*, 38 Conn. 368 ; s. c., 9 Am. Rep. 382 ; *Heller v. Sedalia*, 53 Mo. 159 ; s. c., 14 Am. Rep. 444 ; *Hayes v. City of Oshkosh*, 33

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Wis. 314 ; s. c., 14 Am. Rep. 760 ; *Field v. City of Des Moines*, 39 Iowa, 575 ; s. c., 18 Am. Rep. 46 ; *Davis v. City Council*, 51 Ala. 139 ; s. c., 23 Am. Rep. 545 ; *Taintor v. Wooster*, 123 Mass. 311 ; s. c., 25 Am. Rep. 90 ; *Hafford v. City of New Bedford*, 16 Gray, 297 ; *Kelley v. City of Milwaukee*, 18 Wis. 83 ; *Faulkner v. City of Aurora*, 85 Ind. 130 ; Dill. Mun. Corp., § 774.

Judgment affirmed as of the date of the submission.

Judgment affirmed.

SPAITS V. POUNDSTONE.

(87 Ind. 522.)

Libel — publication — letter.

No action lies for a libel published only by writing and mailing it to the plaintiff.

ACTION of libel. The opinion states the case. The defendant had judgment below.

I. Klingensmith, for appellant.

J. C. Green, for appellee.

MORRIS, C. The appellant sued the appellee for libel and slander. The complaint is not long, and is as follows:

“The plaintiff complains of the defendant, and says that on the 19th of October, 1881, the defendant, both orally and in writing, spoke, composed, wrote and published, of and concerning the plaintiff, the following false, wicked, malicious and slanderous words and written slander and libel, of and concerning the plaintiff, as follows, to wit: She, the defendant, composed, wrote and directed the following written letter, and addressed it to her by due course of mail of the United States, as follows, to wit:

“‘INDIANAPOLIS, INDIANA, *October 19th*, 1881.

“‘Barley (she, the defendant, meaning the plaintiff), you have stole my watch, this I can prove by good witnesses, and more than that, I can prove it by good friends of yours, that you stole my watch and presented it to your daughter, and that your daughter is

now wearing it. I want you to plainly understand that I have just put detectives on your track to hunt this matter up. There is no use of your thinking you can escape the officers, for you will not be able to escape them. So I would say again, you had better express me that watch immediately, and save further trouble. I have sufficient proof in this matter.

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"That said letter was addressed to this plaintiff in the name of 'Barley,' being an abbreviation of 'Bearleon,' her middle name; that the plaintiff is known and often called 'Barley,' by reason of which she has been damaged," etc.

"2d. And the plaintiff, further complaining of the defendant, says that the said defendant, on or about the 10th day of November, 1881, spoke of and concerning this plaintiff, in the presence and hearing of Thomas J. Breedlove and this plaintiff, the following false, slanderous and defamatory words, viz.: 'I did say to Rebecca McClure that you stole my watch. I did write you letters accusing you (meaning the plaintiff) of stealing my watch. I did circulate reports that you (meaning the plaintiff) stole my watch, and made a present of it to your daughter.' To the damage of this plaintiff," etc.

The appellee demurred separately to each paragraph of the complaint. The court sustained the demurrer, and the appellant declining to amend, final judgment was rendered for the appellee. The ruling of the court upon the demurrer is assigned as error.

We understand the first paragraph of the complaint to charge that the libellous matter contained in the letter therein set forth was published of the appellant by sending the same to her through the mail and not otherwise. It is alleged that the letter was addressed to the appellant; that it was sent to her through the United States mail, and that she received it. It is not alleged that any one else saw or read the letter. Does the complaint allege a publication? Will a letter, containing libellous matter, sent to the plaintiff by post, support an action? This question was decided in the negative as early as 1724. *Barrow v. Lewellin*, Hob. 62.

In the case of *Lyle v. Clason*, 1 Cai. 581, it was held that sending a libellous letter to the plaintiff himself is not a ground for an action by him; that every letter is presumed to be sealed; that in an action for libel, contained in a letter addressed to the plaintiff, publication cannot be proved by showing that the plaintiff received it.

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In the case of *Fonville v. McNease*, Dudley (S. C.), 303; 32 Am. Dec. 49, it was held that where a party threw a sealed letter, addressed to the plaintiff, into the inclosure of another, who delivered it unopened to the plaintiff, it was not a publication, even though the plaintiff afterward repeated the contents publicly. *Dellacroix v. Thevenot*, 2 Stark. 63.

Addison says: "Libellous matter contained in a letter addressed to the plaintiff himself, and only delivered into his own hands, is not such a publication of a libel as will support an action." Add. Torts, 1147.

Odgers says: "Merely composing a libel is not actionable unless it be published. And it is no publication when the words are communicated to the person defamed; for that cannot injure his reputation. A man's reputation is the estimate in which others hold him; not the opinion which he has of himself. The attempt to diminish our friend's good opinion of himself, though possibly unpleasant to him, is yet generally ineffectual, and is certainly not actionable, unless some one else overhears." Odgers Libel and Slander, § 150.

The appellant calls our attention to *Miller v. Butler*, 6 Cush. 71; *Kiene v. Ruff*, 1 Clarke (Iowa), 482; *McCombs v. Tuttle*, 5 Blackf. 431; 2 Greenl. Ev., § 416.

In the first of the above cases it was shown that Jencks wrote the libel, and that Butler assisted in its composition. The letter was sent to the plaintiff by mail and received by him. It was held that there was sufficient evidence of a publication. It is obvious that the part of each took in the composition and transmission of the letter was a publication in the presence and hearing of the other. The evidence of publication was therefore complete as to both.

In the case of *McCombs v. Tuttle*, *supra*, the letter was publicly read before it was sent, and in *Kiene v. Ruff*, *supra*, the letter was given to a clerk to be copied. The cases, we think, do not support the appellant.

Greenleaf says: "The sending of a letter by the post is a publication in the place to which it is sent." The writer evidently means if sent to a third person.

The sending of a letter, containing a libel, to the party libelled, might be, as it has been somewhat doubtingly held in a few cases, sufficient in a criminal case, because it would tend to provoke a breach of the peace. But after a careful examination, we have

been unable to find a case holding that the sending of a letter containing libellous matter to the party defamed, where no third party hears or reads it, will support a civil action. We think the court did not err in sustaining the demurrer to the first paragraph of the complaint.

[Omitting a question of pleading.]

We think there is no error in the record, and that the judgment should be affirmed.

PER CURIAM. It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY V. ADAMS.

(87 Ind. 385.)

Telegraph company — contract to evade penal liability.

A telegraph company cannot by contract evade a penal statutory liability for failure to transmit a message correctly.

ACTION for a statutory penalty. The opinion states the case. The plaintiff had judgment below.

J. A. Stein and G. W. Collins, for appellant.

J. R. Coffroth, T. A. Stuart and W. C. Wilson, for appellee.

ZOLLARS, J. This action was brought in the court below by appellee, to recover of appellant the statutory penalty for a failure of duty in the transmission of a message. A demurrer to the complaint was overruled, appellant excepted, and has assigned the ruling for error in this court.

[Omitting this point.]

The only other error assigned is the overruling of appellant's motion for a new trial. The position of counsel is that by the use of one of appellant's blanks appellee contracted away his right to maintain this action. The statute under which the action is brought is as follows:

Western Union Telegraph Company v. Adams.

“§ 1. Be it enacted by the general assembly of the State of Indiana, that every electric telegraph company, with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall during the usual office hours receive despatches whether from other telegraphic lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty in case of failure to transmit, or if postponed out of such order, of \$100 to be recovered by the person whose despatch is neglected or postponed: Provided however that arrangement may be made with the publishers of newspapers for the transmission of intelligence of general and public interest, out of its order, and that communications for and from offices of justice shall take precedence of all others.” 1 R. S. 1876, p. 868; R. S. 1881, § 4176.

Upon the blank used by the appellee there were printed regulations and conditions. So far as they are claimed to bear upon this case they are as follows: “All messages taken by this company are subject to the following terms: To guard against mistakes or delay the sender of a message should order it repeated; that is telegraphed back to the originating office for comparison. For this one-half rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for the non-delivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same.”

The message in this case was not repeated. It may be conceded that by the use of the blank appellee became a party to the agreement printed thereon. What the force and effect of that contract would be, and how far binding upon appellee, if this were an action for civil damages, we need not decide in this case. This is not an action for civil damages, but for the recovery of a penalty under the statute. If the regulation and contract is such as the company may lawfully make under statute, appellee is bound by it, and can not maintain this action. Has the company power to make and enforce the contract, and thus defeat the object of the statute? This question has been answered in the negative in former decisions of this court. We are satisfied with the reasoning and conclusions in those cases. *Western Union Tel. Co. v. Buchanan*, 35

It follows from what we have said that the trial court did not err in overruling the demurrer to the complaint and the motion for a new trial.

The judgment is affirmed at the costs of appellant.

Judgments affirmed.

OGLE V. BROOKS.

(87 Ind. 600.)

Evidence—of other similar suits and acts.

In an action by a woman for assault and battery with lecherous intent, evidence is inadmissible to show a former similar charge by her against another man, and her acceptance of money in compromise; or that the defendant had made like assaults on other women.

ASSAULT and battery. The opinion states the case. The defendant had judgment below.

W. Garver, R. Graham, T. J. Kane and T. P. Davis, for appellants.

D. Moss and R. R. Stephenson, for appellee.

ELLIOTT, J. Appellants are husband and wife, and this action was instituted by them to recover for an assault and battery alleged to have been committed on the wife, Electa Ogle, by the appellee, to compel her to submit to sexual intercourse with him.

The court permitted the appellee to prove, that several years before the assault and battery testified to by appellants' witnesses, the appellants had made a similar charge against one Hendersen Brown, and that he had paid them \$125 to compromise the matter. This evidence was improperly admitted. The general rule unquestionably is that one case or one defense cannot be made out by proving another of like character, and the case in hand is not within any of the exceptions to the general rule.

Ogle v. Brooks.

The appellants offered to prove by several female witnesses that the appellee had made assaults upon them for the purpose of forcing them to submit to his lustful embraces. The court refused to admit this evidence, and was clearly right in so ruling. If the principle acted upon by the trial court in admitting the testimony of the occurrence between Brown and appellants were correct, then doubtless the exclusion of this evidence would have been erroneous; but the principle upon which the court acted was an incorrect and unsound one. The ground upon which that evidence was admitted finds no support from reason or authority.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

HENDERSON V. BLACKBURN.

(104 Ill. 237.)

Will — devise during life, with power of disposal.

A testator devised his whole estate to his wife, "to have and to hold or to dispose of so much of the same as she may need or wish to use during her life-time," and provided that "after her death if there is any thing left," it should be divided in a specified way. *Held*, that the widow's power of disposal was absolute and not limited to her life estate, but could only be exercised in case and to the extent of her need. (*See note, p. 788.*)

EJECTMENT. The opinion and head-note show the case. The defendant had judgment below.

Golden & Wilkin, for appellant.

S. S. Whitehead, for appellee.

SHELDON, J. The controversy in this case is upon the construction of the second and third clauses of the will of Julius H. Blackburn, what thereunder was the power of disposition of the

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real estate devised, which was given to the widow, Polly Blackburn.

It appears to be the quite well-settled doctrine that where a power of disposal accompanies a bequest or devise of a life estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life could make, unless there are other words clearly indicating that a larger power was intended. *Bradley v. Westcott*, 13 Ves. 445; *Smith v. Bell*, 6 Pet. 68; *Boyd v. Strahan*, 36 Ill. 355; *Seigwald v. Seigwald*, 37 id. 430; *Mulberry v. Mulberry*, 50 id. 67; *Brant v. Virginia Coal and Iron Co.*, 93 U. S. 326; *Giles v. Little*, 104 id. 291. This doctrine is relied upon in favor of the appellant, it being insisted that it was a life estate which was here devised to the widow, and that the power of disposal which was given to her was such disposal only as a tenant for life could make. There was not here a devise of an estate for life in express terms, but the devise was, "to have and to hold, or to dispose of so much of the same as she may need or wish to use during her life-time." The power being given to dispose of so much of the property as she might need or wish to use during her life-time, we cannot doubt that had the widow needed all this property for her support during her life-time, she might have disposed of the whole of it for such purpose, the power to do so being given in express terms. The form of the power of disposal given in this case being "of so much of the property as the widow might need or wish to use during her life-time," includes the idea that it was only a life interest which she might dispose of, and plainly intends the power of disposition of the whole interest in the property for the purpose named.

The words in the third clause of the will, "and after her death, if there is any thing left," imply a power of disposition by the widow of the whole property devised. There are cases which hold where by will, there is given a life estate in real and personal property, and there is a devise over in somewhat similar phrase as the above, as in *Siegwald v. Siegwald*, "what may be left," in *Green v. Hewitt*, 97 Ill. 113, and *Giles v. Little*, above, "or whatever remains," that those words are to be limited to the personal estate, and do not apply to the real estate; or as in *Blanchard v. Blanchard*, 1 Allen, 223, that the words meant the property left after the life estate had terminated. But the words here used, "if there is any

thing left," do not admit of such construction. These words imply that there might not be any thing whatever left of either real or personal property, they expressing a doubt whether there would be any thing left after the death of the widow, showing that it was then in the contemplation of the testator that the widow might dispose of the entire interest in the real property, leaving nothing, and thus that he intended she should have such power of disposition.

In the recent case of *Clark v. Middlesworth* (Sup. Ct. Ind.), it was held, where the language of a devise was, "all my property, real and personal, to my wife, Mary A. Clark, during her life, and at her death, should any thing remain, the same to be divided among my heirs at law," that this was a devise of a life estate, coupled with a power of alienation; that such power was given the widow by the clearest implication, by the words, "and at her death should any thing remain." And see *Paine v. Barnes*, 100 Mass. 470.

We find in the will under consideration, the words which we have adverted to clearly indicating that a larger power of disposal was intended to be given by the will than that of a life estate, a power of disposal of the fee, and hence that the case does not come within the doctrine relied upon limiting the right of disposition to the life estate, where there is a power of disposal accompanying a devise of a life estate.

But although we find that by this will there was given to the widow the power of disposition in fee of the real estate devised, yet it was not an absolute power of disposal which was given, it was a power only "to dispose of so much of the same as she may need or wish to use during her life-time." The power of disposition was limited to the need and personal use of the widow. For such purpose she might dispose of the property, but not for any other purpose. Does the deed in question, of the widow to William Blackburn, come within the limit of the power as a disposition of the property for the widow's own need and personal use, or for another and different purpose, and so not authorized by the power given by the will? We are inclined to view this deed in the latter light. By the deed itself, instead of disposing of the property to meet any need or personal use of the widow herself, the property is expressly retained for her use and enjoyment so long as she lives, and it is not until her death that the deed is to take effect. The purport of the instrument is to dispose of the use and enjoyment of the prop-

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erty after her death, to be in reality for the benefit of the grantee, rather than to meet the requirement of any need or use of the grantor. Upon its face the deed appears to us to be in substantial effect in the nature of a testamentary disposition in favor of William Blackburn, the grantee. Clearly the widow was not authorized by the will to make a devise of the land.

The minor requirements which the deed contains looking to the interest of the grantor, as that the grantee shall attend to the property, keep it in repair, and attend to the wants generally of the grantor, we do not regard as sufficient to stamp the object, of the deed as for the deed and personal use of the grantor. It still appears to us to bear the character of a conveyance made in the interest and for the benefit of William H. Blackburn, rather than a disposition of the property, as contemplated by the will, for the need and personal use of the widow, and not to be a fair execution of the power which was conferred by the will. It follows that the instructions of the court below to the jury, that the will vested Mrs. Blackburn with full ownership of the land devised, and that her deed to William Blackburn conveyed to him the perfect title of the land, were erroneous.

The court excluded proof which was offered on the trial that at the time the testator made his will his wife was about eighty-five or ninety years old; that he owned and resided on a farm of two hundred acres of land, over one hundred acres in cultivation, worth an annual rental of at least three dollars per acre; that he owned personal property of the value of \$4,000 or \$5,000, mostly interest-bearing notes; that he owned and possessed all said property at his death, in January, 1869; that his widow continued to reside on the homestead until her death, and that there was paid to her in June, 1871, on a final settlement of her husband's estate, nearly \$2,000 in money. We think this testimony might properly have been received as bearing upon the question whether the disposition of the land was needed for the support of the widow, or was in truth, made for her personal use.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

SCHOLFIELD, J., took no part.

NOTE BY THE REPORTER.—In *Clark v. Middlesworth*, 82 Ind. 240, the devise was for life, "and at her death, if any thing should remain," to be divided, etc. The court said: "We think it quite clear that the will of A. B. Clark gave to his widow, Mary A. Clark, a life estate in said lot, and that it also gave her, by the clearest implication, a power to

dispose of the same. The words, 'and at her death, should any thing remain,' are senseless and without meaning, unless the testator intended that the tenant for life might, prior to her death, dispose of the property devised to her for life. The words clearly show that he must have contemplated this at the time, and therefore have intended it. *Paine v. Barnes*, 100 Mass. 470; *Andrews v. Bank of Cape Ann*, 3 Allen, 313. The appellants insist that the above words do not confer upon the tenant for life a power to convey, and refer us to the case of *Blanchard v. Blanchard*, 1 Allen, 223. The words, in the case referred to, from which the power to sell and convey was attempted to be inferred, were 'all the property * * * that may be left at the death of my wife,' etc. The court held that the words meant the property left after the life estate given to the wife had terminated. But as by the will personal as well as real estate had been given to the wife for life, the court was inclined to admit that the words might imply a power to dispose of the personal, but not of the real estate. No such construction can be given to the words, 'should any thing remain,' found in the will of Aaron B. Clark."

In *Campbell v. Beaumont*, 91 N. Y. 464, the same was held of the following: "I leave to my beloved wife, Mary Ann, all my property * * * to be enjoyed by her, for her sole use and benefit, and in case of her decease, the same, or such portion as may remain thereof, it is my will and desire that the same shall be received and enjoyed by her son," etc.; "thus vesting," said the court, "the whole in the wife—the fee of the real estate, and the use and power of disposition of both real and personal estate. In what other manner can the words be satisfied? The testator 'leaves,' that is, gives to his wife—withholds nothing—and then adds, 'to be enjoyed by her for her sole use and benefit.' There are no words of qualification, and giving to those used their exact sense, she is put in the place of the testator as to title, and all rights and privileges belonging to it."

In *Terry v. Wiggins*, 47 N. Y. 512, there was a devise of the estate to the wife, "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or in the whole, if she should require it or deem it expedient to do so," etc. The court said: "This conditional power of disposal does not operate to enlarge the estate to a fee. The power is conferred the better to secure to the devisee the benefit of the property for her 'personal use and maintenance.' The power of disposal is not absolute so as to bring it within the rule making all devises with absolute power of disposal in the devisee's gift in fee. The power could only be exercised under the will in case the wife should require it or deem it expedient; that is, with a view to her 'personal use and maintenance,' the purposes for which it was given." This case is distinguished in *Campbell v. Beaumont*, *supra*.

In *Paine v. Barnes*, *supra*, the gift was "for her support and benefit during her natural life," and after her death, "if any thing should remain," it was to go to others. *Held*, that the widow could not mortgage the land unless necessary for her benefit and support.

In *Brant v. Virginia Coal and Iron Co.*, 98 U. S. 336, the language under construction was: "to have and to hold during her life and to do with as she sees proper before her death." This was held to confer only a life estate. The court said: "We are of opinion that the position taken by the complainant is the correct one. The interest conveyed by the devise to the widow was only a life estate. The language used admits of no other conclusion; and the accompanying words, 'to do with as she sees proper before her death,' only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and perhaps without liability for waste committed. These words, used in connection with a conveyance of a leasehold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected."

"In the case of *Bradley v. Westcott*, reported in the 13th of Vesey, the testator gave all his personal estate to his wife for her sole use for life, to be at her full, free and absolute disposal and disposition during life; and the court held, that, as the testator had given in express terms an interest for life, the ambiguous words afterward thrown in could not extend that interest to the absolute property. 'I must construe,' said the master of the rolls, 'the subsequent words with reference to the express interest for life previously given, that she is to have as full, free and absolute disposition as a tenant for life can have.'"

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"In *Smith v. Bell*, reported in the 6th of Peters, the testator gave all his personal estate, after certain payments, to his wife, 'to and for her own use and disposal absolutely,' with a provision that the remainder after her decease should go to his son. The court held that the latter clause qualified the former and showed that the wife only took a life estate.

"In construing the language of the devise, Chief Justice MARSHALL, after observing that the operation of the words 'to and for her own use and benefit and disposal absolutely,' annexed to the bequest, standing alone, could not be questioned, said, 'but suppose the testator had added the words 'during her natural life,' these words would have restrained those that preceded them, and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit and to a disposal for the life of the wife. The words, then, are susceptible of such limitation. It may be imposed on them by other words. Even the words 'disposal absolutely' may have their character qualified by restraining words connected with and explaining them, to mean such absolute disposal as a tenant for life may make.'

"The chief justice then proceeded to show that other equivalent words might be used equally manifesting the intent of the testator to restrain the estate of the wife to her life, and that the words, 'devising a remainder to the son,' were thus equivalent.

"In *Boyd v. Strahan*, 36 Ill. 355, there was a bequest to the wife of all the personal property of the testator not otherwise disposed of, 'to be at her own disposal, and for her own proper use and benefit during her natural life;' and the court held that the words 'during her natural life' so qualified the power of disposal, as to make it mean such disposal as a tenant for life could make.

"Numerous other cases to the same purport might be cited. They all show, that where a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended."

See *Durleigh v. Clough*, 52 N. H. 267; s. c., 13 Am. Rep. 28; *McKenzie's Appeal*, 41 Conn. 607; s. c., 19 Am. Rep. 525.

PRINCE V. CITY OF QUINCY.

(106 Ill. 138.)

Constitutional law — limitation of municipal indebtedness.

Where the constitution forbids any municipal corporation to become indebted beyond a certain amount "in any manner or for any purpose," that amount may not be exceeded even for necessary current expenses.

ACTION of damages for breach of contract. The opinion states the case. The defendant had judgment below.

Marsh & McFaddon, for appellant.

Sibley, Carter & Gouvert and *Carl E. Epler*, city attorney, for appellee.

MULKEY, J. On the 7th of August, 1873, the city of Quincy, by ordinance, entered into a contract with Edward Prince, by

which the latter agreed to construct, maintain and keep in operation within the corporate limits of the city, a general system of water works, to be extended and enlarged from time to time, as the growth of the city and wants of its inhabitants should require. For the use of the water by the city for the extinguishment of fires, and other purposes, the city agreed to pay Prince \$2,600 per annum, in monthly installments, and also, in like manner, \$200 per annum for each fire hydrant for the first hundred, \$150 for the next additional fifty, and \$100 for all in excess of one hundred and fifty. The rights of Prince under the ordinance were made exclusive, and the contract was to run for a period of thirty years, and at its expiration, if not renewed, the city was to purchase the works at their cash value. The city reserved the right to purchase the works at any time, though upon terms decidedly onerous to the city.

The works were constructed as contemplated by the ordinance, and the terms of the agreement were mutually observed by the respective parties for a number of years, when the city, assuming the agreement had been entered into on its part without legal authority, declined to further conform to its requirements, and so notified Prince. The latter not acquiescing in this view of the matter, brought the present action against the city to recover damages alleged to have been sustained by the plaintiff by reason of the failure and refusal of the defendant to perform said agreement. The cause was tried upon an issue of law, at the October Term, 1880, of the Adams Circuit Court, resulting in a judgment for the defendant, which was affirmed on appeal to the Appellate Court for the Third District.

The errors assigned upon the record question the ruling of the Circuit Court in sustaining a demurrer to the plaintiff's replication to the defendant's amended additional plea, and the decision of the case here depends entirely upon the correctness of that ruling. The form of the action was assumpsit, the plaintiff counting specially upon the agreement above mentioned.

The additional amended plea, which was plead in bar of the count, alleged, in substance, that the city of Quincy, at the time of making the agreement sued on, was, and from thence to the time of the commencement of the suit had continued to be, otherwise indebted, in an amount exceeding the constitutional limit of five per cent on all the taxable property in the city. To this

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plea the plaintiff replied, that the said several sums of money sought to be recovered "pertained to the ordinary expenses of the defendant in the administration of the affairs and government of the city, and that at the time of the making of said contract the said several sums of money so provided to be paid monthly by said defendant to said plaintiff, together with other ordinary expenses of the government of the said defendant, were within the limits of the current revenues of said defendant."

If the plea presented a defense to the action, we are quite clear the replication afforded no sufficient answer to the plea, and upon that hypothesis the court properly sustained the demurrer to the replication. Whether the plea in question presented a defense to the action, depends upon the construction which must be given to section 12 of article 9 of the Constitution, already alluded to. That section, or so much thereof as relates to the question in hand, declares that "no county, city, township, school district, or other municipal corporation, shall be allowed to become indebted, *in any manner or for any purpose*, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness." Now if it be true, as is claimed, that this provision of the Constitution has no application to liabilities arising under contracts like that set forth in the declaration, it is very evident the plea presented no defense to the action, and the demurrer should have been carried back and sustained to the plea.

While the provision of the Constitution just cited declares, in emphatic terms, that a city or other municipality whose existing indebtedness already exceeds the constitutional limit, as was the case here, shall not become further indebted "*in any manner or for any purpose*," it is seriously contended by counsel for appellant that a municipality thus circumstanced may become indebted for supplies to meet its ordinary wants and necessities. To so construe the Constitution would be to add a provision, in the nature of an exception, to the Constitution, which the framers of that instrument did not see proper to insert. This, as is well settled by an unbroken current of authority, is not permissible where the language of the law is clear and unambiguous, as is the case here, except where to give effect to the language used, according to its literal terms, would lead to a gross absurdity or manifest wrong or inconsistency, which

courts will not impute to a legislative body. That no such consequences will flow from giving effect to this provision of the Constitution according to the obvious meaning of the language in which it is conceived, will hardly be claimed by any one. The object and purpose of the framers of the Constitution in adopting this provision have, on more than one occasion, received the deliberate and mature consideration of this court, and we do not feel called upon to repeat what we have already said on the subject, but will content ourselves with a reference to the cases containing the previously expressed views of this court in relation to it: *City of Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 id. 385.

It is claimed the construction given in the above cases to the provision of the constitution under consideration is modified by the case of *East St. Louis v. East St. Louis Gas Light and Coke Co.*, 98 Ill. 430; s. c., 38 Am. Rep. 97. But such is not the case. That was a suit for gas, and in answer to the claim that the city had already under this provision of the Constitution, exhausted its power to contract a further indebtedness, it is distinctly stated in the opinion in that case that it did not affirmatively appear that at the time the gas was furnished the city was indebted beyond the Constitutional limit, and hence a recovery was permitted. Such is not the case here, as we have already seen.

The judgment will be affirmed.

Judgment affirmed.

NORTH CHICAGO CITY RAILWAY COMPANY V. TOWN OF LAKE VIEW.

(106 ILL. 207.)

Municipal corporation — power to prohibit nuisance.

A municipal corporation empowered to define, declare, prevent and abate nuisances, and punish their promoters, may by ordinance prohibit the running of street cars by steam, under penalty for violation, in the absence of any legislative grant authorizing such use of the streets.

CONVICTION of using steam as a motive power in a public street. The opinion states the case.

W. C. Gourly, for appellant.

North Chicago City Railway Company v. Town of Lake View.

M. W. Robinson, for appellee.

MULKEY, J. This is an appeal from a judgment of the Appellate Court in the First District, affirming a conviction in the Criminal Court of Cook county of the North Chicago Railway Company, for using steam as a motive power in operating its railway along and over one of the public streets of the town of Lake View, in Cook county, contrary to the provisions of an ordinance of that town.

The fact of the company's using steam for the purpose of propelling its cars along the street in contravention of an ordinance of the town, is conceded, but the act is sought to be justified on two grounds, both of which are urged by counsel with much earnestness and apparent confidence. First, it is claimed the town had no authority to pass the ordinance declaring the use of steam for the purpose of propelling the company's cars along the street a nuisance, as was attempted to be done. In the next place it is contended that the act complained of is authorized by the company's charter. We will consider these questions in the order stated.

Appellee is incorporated under the act of 1865, entitled "An act to incorporate a board of trustees for the town of Lake View, in Cook county," and an act amendatory thereof, passed in 1867. By the 1st section of the original act the supervisor, assessor and commissioners of highways of the town of Lake View are declared to be *ex officio*, a board of trustees for the said town of Lake View, and by other provisions of the two acts are clothed with the ordinary powers usually conferred upon other municipal corporations. By the 7th section of the amendatory act of 1867 it is expressly provided "the board of trustees shall have the control and supervision of the highways, streets, alleys, public grounds and parks in said town;" and by the 11th section it is further provided, "the board of trustees shall have power to define and declare what shall be deemed nuisances, and to prevent and abate the same, and provide for the punishment of offenders against any order or ordinance passed concerning the same, by fine or imprisonment, or both," etc. These provisions, in the absence of any legislative grant authorizing the use of steam as a motive power for the purpose of propelling street cars, we are of opinion warranted the town in passing the ordinance in question.

We do not at all question the general proposition, which has been argued with so much elaboration by appellant's counsel, that under

a general grant of power over nuisances, like the one in question, town authorities have no power to pass an ordinance declaring a thing a nuisance which in fact is clearly not one. The adoption of such an ordinance would not be a legitimate exercise of the power granted, but on the contrary, would be an abuse of it. But in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question.

As already conceded, there are many innoxious useful things which the municipal authorities of a town or city could not lawfully, under a general grant of power like the one in question, declare nuisances—such, for instance, as the exercise of certain trades and callings, as that of a physician, druggist, and the like. In all such cases as these, courts, acting upon their own experience and knowledge of human affairs, would say, as matter of law, the exercise of these trades or callings, or things of like character, is not a nuisance, and that any attempt to so declare them by the municipal authorities would be an unwarranted abuse of their power. On the other hand, there are many things which courts, without proof, will, on the same principle, declare nuisances. Such for instance would be the digging of a pit, or the erection of a house, or other obstruction, in a public highway; and an ordinance passed by a town or city having, as in the present case, a general power over the subject, declaring such obstructions nuisances, would be valid on its face, and a conviction might properly be had under it, without any extrinsic proof to show the act complained of was in fact a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance. And so we regard the use of steam, in the manner specified in the ordinance, for the purpose of propelling street cars along a public street in a thickly populated town, in the absence of any legislative grant authorizing it to be done. Such a use of steam, under the circumstances stated, is, *per se*, a nuisance.

[A minor consideration omitted.]

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

SCOTT, C. J., dissenting.

Wabash, St. Louis & Pacific Railway Company v. Shacklet.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY V. SHACKLET.

(105 ILL. 304.)

Negligence — concurrent — remedy.

Where a railway passenger is injured by a negligent collision of his train with that of another company, he may maintain an action for the wrong against either company.*

ACTION of damages for negligence causing death of plaintiff's intestate. The opinion states the case. The plaintiff had judgment below.

G. B. Burnett and Frank W. Burnett, for appellant.

Waldo P. Johnson and M. Millard, for appellee.

MULKEY, J. This is an appeal from the Appellate Court for the fourth district, affirming a judgment of the City Court of East St. Louis, rendered at its August Term, 1881, against the Wabash, St. Louis and Pacific Railway Company, the appellant, for the sum of \$3,500, in an action brought by Eliza J. Shacklet, the appellee, as administratrix of Elijah E. Shacklet, her late husband, to recover damages for injuries received by him in a railway collision, resulting in his death, charged to have been caused by the negligence of the appellant.

The injury complained of occurred in East St. Louis, on a short line of railroad belonging to the St. Louis National Stock Yards, and was caused by a collision of two trains of cars, belonging respectively to the appellant and the Union Railway and Transit Company. The road on which the collision occurred connected the stock yards with the various lines of railway running through or terminating at East St. Louis, and was open alike to the free and common use of all railway companies for the purpose of shipping live stock to or from the stock yards. This connecting line of road belonging to the stock yards company consists of two main tracks, connected at or near the stock yards by necessary switches and turn-outs, so that with proper care and precaution collisions

*To same effect *Cuddy v. Horn*, (46 Mich. 506), 41 Am. Rep. 178; *Transfer Co v. Kelly* (36 Ohio St. 86), 38 Am. Rep. 558.

between incoming and outgoing trains might readily be avoided. The track on which the collision occurred is called the "wall track," and the evidence tends to show that trains going in with stock were entitled to the right of way on this track. At the time of the accident the transit company was pulling a train into, and the appellant was pushing one out from, the stock yards on this wall track, both trains being loaded with live stock, but owing to a sharp curve in the track, and some obstructions on the line of the road, those having the trains in charge did not discover their close proximity till it was too late to avoid the collision. Shacklet, at the time, was riding on the engine of the transit company's train, and a number of the cars belonging to it were loaded with his stock.

[Omitting other questions.]

It is also contended by appellant's counsel, that where, in an action like this, a passenger on a railway, or his legal representatives, seek to recover damages occasioned by the colliding of two trains belonging to different companies, and it appears the collision was caused by the contributory negligence of the servants of both companies in the management of their respective trains, however free such passenger may have been from any contributory negligence himself, he or his legal representatives can only maintain an action against the company upon whose train he was a passenger. Assuming this to be the law, had there been no instruction given to the jury laying down a contrary rule, we might content ourselves by saying the affirmance of the judgment of the trial court by the Appellate Court conclusively negatives the charge of contributory negligence on the part of the transit company. But such is not the case. By appellee's first and second instructions the court in effect told the jury, that in such cases where the collision is caused by the mutual negligence of the servants of both companies, and the passenger himself is without fault, he or his legal representatives may nevertheless maintain an action against either company. It is true the court, by appellant's third instruction, as we understand it, lays down the very reverse of this proposition as the law governing the case ; but if the rule, as stated in appellee's first and second instructions, is not correct, it is quite clear the error is not cured by the giving of appellant's third instruction, for under the circumstances the jury had no means of determining which set of instructions was right. So by the appellant's exception to appellee's first and second instructions the question is directly presented,

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whether a passenger on one train can maintain an action against the owner of another train on account of injuries received in a collision between the two, caused by the mutual negligence of the servants in charge of both trains, where it affirmatively appears such passenger acted with due care, and in no way contributed to the result. The courts of England and of Pennsylvania, and possibly others to which our attention has not been called, have answered this question in the negative, while the courts of New York, New Jersey and Kentucky answer it the other way. Among the text-writers, Shearman & Redfield, Wharton and Thompson, all place themselves in line with the latter courts in holding the action will lie. *Dyer v. Erie Ry. Co.*, 71 N. Y. 288; *Chapman v. New Haven R. R. Co.*, 19 id. 341; *Bennett v. New Jersey R. Co.*, 36 N. J. 225; *Danville Turnpike Co. v. Stewart*, 2 Metc. (Ky.) 119; *Louisville R. Co. v. Case's Admr.*, 9 Bush, 728; Shearm. & Redf. Neg. 48; Whart. Neg., § 395; Thomp. Carriers, 284.

The leading English case denying the right of action in such cases is *Thorogood v. Bryan*, 8 C. B. 131. In this case the injury complained of was caused by the collision of two rival omnibuses, occasioned by the mutual negligence of the drivers. Of course the same principles apply to collisions of this kind that are applicable to railway collisions under like circumstances. It was said by MAULE, J., in that case: "Although I, at one time, entertained a contrary impression, I incline to think that for this purpose the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased. If the deceased himself had been driving, the case would have been free from doubt. So there could have been no doubt had the driver been employed to drive him, and no one else. On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that can not, with propriety, be said. He selects the conveyance. He enters into a contract with the owner, whom, by its servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. According to the terms of his contract he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey." We have made this very copious extract in order that the reasons on which the English rule was originally founded may

distinctly appear, with the view of showing, from subsequent English cases, and the Pennsylvania cases which follow them, that while the rule itself has, on the principle of *stare decisis*, since been adhered to, with occasional manifest indications of disfavor on the part of some of the judges, yet the reasons upon which it was originally founded, as above set forth, have been almost entirely repudiated.

In *Lockhart v. Lichtenthaler*, 46 Penn. St. 151, the Supreme Court of Pennsylvania, in adhering to the English rule as announced in *Thorogood v. Bryan*, *supra*, said: "I do not think however the *rationale* of the principle is satisfactorily expounded in *Thorogood v. Bryan*, viz., the identity of the passenger with his own vehicle. I would say the reason for it is, that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances, as an incentive to care and diligence."

In *Armstrong v. Lancashire R. Co.*, 10 Exch. 47, a late English case, POLLOCK, B., in referring to *Thorogood v. Bryan*, *supra*, said: "The only difficulty in it arises from the use of the word 'identified' in the judgment. If it is to be taken that by the word 'identified,' is meant that the plaintiff, by some conduct of his own, as by selecting the omnibus in which he was travelling, has acted so as to make the driver his agent, this would sound like a strange proposition, which could not be entirely sustained. But what I understand it to mean is, that the plaintiff, for the purpose of the action, must be taken to be in the same position of the omnibus, or his driver. This is illustrated by the case of *Waite v. Northwestern Railway*, where it was held that a child, with regard to contributory negligence, was identified with its grandmother who accompanied it, although it was impossible to say there was any selection of the companion, or any act or volition on the part of the child."

This hasty and limited reference to some of the cases recognizing the English rule, clearly shows that the views, even of the English judges themselves who have undertaken to expound it, are not at all in accord on the subject. MAULE, J., in the *Thorogood* case, for the purpose of the action identified the passenger with the driver of the coach in which he was riding, on the ground that by voluntarily contracting with the owners for the vehicle, to be driven by a particular driver, the latter thereby became the agent of the passenger in such a sense as to defeat a recovery against the owners

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of the rival omnibus, where it appeared the driver was guilty of contributory negligence. POLLOCK, B., in the subsequent case of *Armstrong v. Lancashire R. Co.*, *supra*, as we have just seen, wholly repudiates the agency theory, and characterizes it as "a strange proposition." He however adheres to the idea of the identity of the passenger and driver for the purposes of the action, for to yield this would be to abandon the rule altogether. In speaking of the expression "identified," as used in the *Thorogood* case, he says: "What I understand it to mean is, that the plaintiff for the purpose of the action be taken to be in the same position as the owner of the omnibus, or driver,"—that is, for the purposes of the action the negligence of the driver or owner must be attributed to the passenger or his legal representatives who seek redress. This is but a mere statement of the rule, and does not throw a particle of light on the real ground of contention between those who oppose and those who favor it. The important inquiry is, what, if any, good reasons have been or can be urged in favor of the rule? It is manifest the agency theory cannot be maintained, for to do so, if logically adhered to, would be to deny the passenger all right of action whatever against the owners of either conveyance, for if the driver, in the case of an omnibus or other vehicle, or the servants of the company, in the case of a railway train, are to be regarded as the mere agents of the passenger, their negligence of course would, in law, be simply the negligence of the passenger, and to permit him to recover from the owner of either conveyance, would be to allow a plaintiff to recover from another on account of his own negligence, which, of course, all must concede could not be done. For this and many other reasons that might readily be suggested, the theory that the servants in charge of a public conveyance are in any sense the agents of a mere passenger, may be regarded as exploded.

The agency theory having been repudiated by POLLOCK, B., as we have just seen, that distinguished judge sought to fortify the rule in question by its supposed analogy to the principle, which in some cases denies a right of action to a person incapable of taking care of himself, as an infant, idiot or the like, for an injury caused in part by the contributory negligence of one having such incapable person in charge. Whether the rule referred to exists to the extent claimed, it is not necessary for us to stop to inquire, for conceding it does, we fail to perceive but little analogy between the

two classes of cases. As an infant of tender years is incapable of perceiving or of avoiding danger, and is unconscious of the probable consequences of its own acts, the law could not consistently, and does not attribute negligence to it. In contemplation of law, and in fact, it is incapable of acting for itself, and is wholly irresponsible. Inasmuch therefore as it is in an entirely helpless condition, the law has wisely intrusted its care and custody to others whose duty it is to exercise for it that prudence and discretion which it is incapable of exercising for itself for the purpose of protecting it not only against the wrongs of others, but also from the consequences of its own improvident acts. This provision of the law is humane in its character, and highly essential to the well-being of the infant itself. Among the duties which the law thus imposes upon those having the custody or charge of an infant, is that of preventing it from going into places of danger, and thereby exposing itself to irreparable injury, which, if done by an adult, would be gross negligence. Since those having the custody or charge of an infant are bound to act and judge for it in all matters of this kind, as it is wholly incapable of judging or acting for itself, it is clear the infant is directly represented by those thus acting for it, and any negligence or want of care on their part in the discharge of this duty should in justice (as it is, so far as third parties are concerned) be treated as the negligence of the infant itself,—and such is the settled doctrine of the courts. But with a sane person, who has arrived at the years of discretion, the case is quite different. He must, at all times and under all circumstances, judge and act for himself in the varied relations of social and business life, and if he, without fault on his part, has been injured through the mutual negligence of two or more persons, he has a right of action against either of the wrong-doers, unless it shall appear he has, either expressly or by implication, authorized the injury complained of,—and so far as his right of recovery is concerned, it makes no difference whether the injury occurred in an omnibus, or in the passenger coach of a railway, or elsewhere. Nor is the right of recovery in such case at all affected by the fact that the parties whose negligence caused the injury were the owners of rival omnibuses or railway trains, in or upon one of which the plaintiff was a passenger. The law extends to a passenger in a public conveyance the same protection against fraud, force and negligence, that it does to any one else, and by assuming the relation of a passenger

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he neither expressly nor impliedly waives that indemnity against injury which the law thus throws around him.

In some of the cases favoring the English rule, one of the reasons assigned why the action should be confined to the carrier company is, that the latter company, by its express or implied contract with the passenger, is under special and additional obligations to him to use due care, and carry him safely, whereas the other company has entered into no such engagement with him. While this affords a conclusive reason why an action *ex contractu* will not lie against the other company, it does not, in our judgment, furnish the slightest reason why an action *ex delicto* may not well be maintained against such other company for a tort committed by it, independently of a contract, which had resulted in an injury to the plaintiff. One of the primary rights of the citizen, sanctioned by the positive law of the State, is security to life and limb, and indemnity against personal injuries occasioned by the negligence, fraud or violence of others. This is a right which avails against all persons whomsoever, and is distinguished from a right which avails against a particular individual or a determinate class of persons. The former is called a right *in rem*, the latter a right *in personam*. The former class of rights exists independently of contract; the latter frequently arises out of contract. These two kinds of rights may exist in the same person at the same time, and though having no connection with each other, may look to the accomplishment of the same object; yet the possession of one does not affect duties and obligations relating to the other. For instance, no one has a right to assault me. This indemnity, which the law affords me, avails against mankind generally, and is therefore a right *in rem*. This right in me imposes a corresponding duty upon all persons whomsoever to refrain from assaulting me; but I may, if I think proper, add to this general security which the law affords me by entering into a contract with some determinate person to not only refrain from assaulting me himself, but also to indemnify me against all damages, resulting from the assaults of others. My right, under this contract, is a right *in personam*, and consequently avails only against the person with whom I made the contract, and although it has for its object the accomplishment of the same end my right *in rem* has, namely, indemnity against assaults upon my person, nevertheless both rights exist in me at the same time, wholly independent of each other. Now if under the circum-

stances supposed I should be assaulted by a stranger, resulting in damages, there is no question but that I might maintain an action *ex contractu*, against the party who specially contracted with me to indemnify me against such assaults. This action would be based upon the breach of my right *in personam*. But by the assault my right *in rem* was also violated, and there is no question but that an action of trespass would lie against my assailant for its violation, and a plea in such action setting up the fact that I had a contract with a third party indemnifying me against all such assaults would hardly stand the test of a demurrer. So in the present case appellee's intestate had a right *in rem*, or a general right, which entitled him, if free from fault himself, to be protected and indemnified against injuries resulting from the negligence of all persons whomsoever, including the appellant, and the fact that the transit company may have specially or impliedly contracted with him for such indemnity on his becoming a passenger on its train, is no answer to an action brought against the appellant for its own negligence.

The Supreme Court of Pennsylvania, as we have already seen, repudiating both the agency and identity theories, maintains the English rule, on the ground "it better accords with the policy of the law to hold the carrier alone responsible in such circumstances, as an incentive to care and diligence." We confess we are unable to perceive the force of this argument, for conceding that to hold the carrier of the plaintiff or his intestate alone responsible would have the tendency claimed, yet to relieve the other guilty party from all responsibility whatever, would have just the contrary effect, so that whatever was gained in one direction would be lost in the opposite direction.

Considering the question then in the light of public policy, we are of opinion the public interests will be best subserved by adhering strictly to the long and well established principle that where one has received an actionable injury at the hands of two or more wrong-doers, all, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff in such case has his election to sue all jointly, or he may bring his separate action against each or any one of the wrong-doers. To sanction a departure from this fundamental principle in the law of torts would create an anomaly in the law not demanded by justice, convenience or public policy.

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It is further urged in some of the cases, that in collisions of this kind there is no concert of action between the servants of the two companies — that each set of servants is acting independently of the other, and in furtherance of opposing purposes, and hence there can be no joint liability between the two companies. However this may be, the present action is not brought against the companies jointly, hence the question mooted is not before us, and we deem it proper therefore to decline any discussion of it. Whatever may be the proper solution of this question, it can not at all affect the right of action in the present case. .

It is finally objected, that under our statute the plaintiff, who is a foreign administrator, is not authorized to bring this action — that by a fair construction of the different provisions of the statute relating to the subject, resident administrators alone are authorized to sue. While this view of the matter is plausible, and not without force, yet we are unable to give our adhesion to it. Upon a careful consideration of the question, we are of opinion the view taken of it by the Appellate Court is the correct one, and that the action is therefore well brought by the administrator.

For the error indicated, the judgment of the Appellate Court is reversed, and the cause remanded to that court, with directions to reverse the judgment of the City Court of East St. Louis, and remand the cause for further proceedings in conformity with the views here expressed.

Judgment reversed.

CHICAGO AND ALTON RAILROAD COMPANY V. JOLIET, LOCKPORT
AND AURORA RAILROAD COMPANY.

(105 Ill. 388.)

Eminent domain — damages — railroads crossing each other.

In a proceeding for the condemnation of a right of way for a railroad across another railroad, no damages may be allowed on account of the statutory requirement to stop trains at such crossings, and the consequent impairment of the hauling capacity of the engines, such requirement being a police regulation subject to legislative repeal,* and such damages being too vague and indefinite for computation.

*In *Peoria, etc., Ry. Co. v. Peoria, etc., Ry. Co.*, 105 Ill. 110, the like doctrine was held as to the delay, inconvenience, trouble and danger.

PROCEEDINGS to condemn a right of way. The opinion states the point.

George S. House, for appellant.

Garnsey & Knox, for appellee.

SCOTT, C. J. This proceeding was commenced under the Eminent Domain act of 1872, on the petition of the Joliet, Lockport and Aurora Railway Company; to condemn the right of way for its own track across the right of way and track of the Chicago and Alton Railroad Company. The width of the right of way desired, and the angle at which petitioner's road will cross defendant's road at the point indicated, are stated with sufficient certainty in the petition to give a clear understanding of the manner defendant's road-way will be affected. So also the use petitioner proposes to make of the strip of land sought to be condemned is stated to be, to build its railroad thereon, and operate its main tracks over and across the same, and it is then added, petitioner does not desire to appropriate and use such strip of land to its exclusive use, but desires to use the same without prejudice to the rights of and use thereof by defendant, not inconsistent with the use thereof by petitioner for its main track or tracks. The defendant corporation answered the petition, and then filed a cross petition. As the case is presented in this court it will not be necessary to state the contents of either of them. The case was submitted to a jury who after viewing the premises and hearing the evidence assessed defendant's damages at \$150, and for which judgment of condemnation was rendered.

[Omitting other questions.]

Another ground relied on with much confidence is, that by the rulings of the trial court defendant was denied the privilege to prove what effect if any the construction of the crossing at the point in controversy would have on the hauling capacity of its engines employed in drawing both passenger and freight trains, in consequence of having to stop its trains in obedience to that provision of the statute which requires that all trains run on any railroad in this State which crosses any other railroad on the same level shall be brought to a full stop within certain distances specified,— and that it is said is error. The court, in giving instructions

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on this branch of the case, made them conform to the theory on which the evidence tendered was excluded, and the rulings in both respects will be considered together.

It appears from the evidence introduced as to the grade of defendant's road, that the track, both ways from the point where it is proposed to construct the crossing of petitioner's road, is practically on a level. A change of grade commences two hundred feet south. It begins to descend from there, and for a distance of four hundred feet it is thirteen and two-tenths feet per mile. Commencing at the point of intersection and running north, as the evidence is understood, defendant's track, for some distance, is practically on a level, and then commences an elevation, the altitude per mile being stated. In view of this condition of defendant's track at and near the point of intersection of the two roads, both north and south, defendant asked a witness, who was familiar with the grade of the road at the place of intersection, the following question: "Upon the theory that a crossing were to be made at this point of this proposed crossing, and the trains of the Chicago and Alton Railroad were to stop at a point distant not less than two hundred feet or more than eight hundred feet from the center line of that crossing, and start again, coming to a dead halt not nearer than two hundred feet or distant more than eight hundred feet of the proposed crossing, what effect, in your judgment, would it have on the hauling capacity of the engines employed by the Chicago and Alton railroad in their service past this point—in their freight service past this point?" This question was objected to, on the ground defendant had no right to recover for any damages which might be occasioned by reason of its servants having to stop their trains at this crossing in obedience to the law. In sustaining the objection the court said: "If the defendant proposes to show that these stops or halts will be occasioned, not by force of any statute or police regulation requiring stops or halts on approaching railroad crossings, but independent of such police regulations or statute, will be required by reason of the proposed track of the petitioner across the railroad track of the defendant, then I think the question may be answered as being competent on this point, otherwise the objection is sustained." Objections to other questions of the same import only differing in phraseology, were sustained by the court. Exceptions to the rulings of the court were taken in the usual manner upon the interrogatories propounded, so far as

the interrogatories involved the existence of any law or police regulation requiring the stopping of trains at railroad crossings.

The questions arising on the rulings of the court on this branch of the case are of first impression in this court, and have been considered with that care their importance demands, and the conclusion reached, is the rulings of the court may be sustained, both on principle and authority. Without the construction of the crossing asked for by the petitioner, it is said, obedience to law in reference to stopping trains at crossing of other railroads is not demanded of defendant in running its train between Lockport and Joliet, and because after the crossing is constructed defendant will be compelled to stop its trains on approaching such crossing from either direction, it is argued the inconveniences and other embarrassments that will be experienced are elements to be considered in estimating the "just compensation" that should be paid for the injuries sustained. This is a mistaken view of the law. The statute in question is simply a police regulation, valid and binding on all railroad companies in the State, whether incorporated before or since its passage. Its duration rests in the will of the general assembly. The decision may be placed on a principle underlying all conduct, that is, that neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare. That is a duty every one owes to government for the protection it affords. Corporations, as well as citizens, are subject to the police power of the State. So far as defendant would suffer injury on account of having to stop its trains at the crossing for reasons other than compliance with the statute, the court distinctly ruled, evidence of such damage, if any, might be given. The rulings of the court in that regard were as broad and liberal as the law will warrant. Under the laws of this State (and so its policy is), one railroad has the right to cross the track of another, and if they cannot agree upon the amount of compensation to be made therefor, or as to the points and manner of such crossing, the same shall be ascertained and determined in the manner prescribed by law. Should it be held that before a new railroad could be laid across the track of a railroad previously constructed, the damage for any inconvenience such company might suffer on account of having to submit to and observe police regulations in regard to the conduct of its business thereafter should first be ascertained and paid by the new road, it

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would amount to a practical prohibition of the construction of new railroads in the State. A railroad company has no vested right to run its trains in defiance of public statutes designed to promote the public good, and no principle is perceived on which such corporations can demand compensation for obedience to such statutes. Immunity from police regulations and restraints would secure to corporations rights not possessed by citizens of the State.

Unless therefore every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the State would be an obstacle in the way of its future prosperity of no inconsiderable magnitude. The claim made for damages in this respect has neither reason nor the weight of authority for its support. In *Railway v. Railway*, 30 Ohio St. 604, it is well said: "While the elder road can demand compensation for its property to the extent of its appropriation, it has no right to demand tribute from the junior road for the enjoyment of the same corporate franchises that it possesses. Each owes its authority to operate its road to the same source — the State — and neither has the right to tax the other for the enjoyment of these mutual privileges. It is true that the crossing imposes a new burden but it is one to which it is subject by the nature of the case and the terms of its charter." Other courts of acknowledged authority sustain the same general doctrine. *Massachusetts Central R. Co. v. Boston, Clinton and Fitchburg R. Co.*, 121 Mass. 125. But aside from all authority, on principle, no compensation ought to be allowed in any case, for mere obedience to law. That is a service all citizens and corporations are bound to render to the State in consideration of the common protection bestowed. See *Peoria and Pekin Union Ry. Co. v. Peoria and Farmington Ry. Co.*, 105 Ill. 110.

The point is made, both by the argument and the instructions asked by defendant, that on account of defendant having to cause its trains to be stopped in compliance with the statute, there is a reduction in the hauling capacity of defendant to do business at and over the point of such crossing, and hence it should be paid in money a sum sufficient to make good any reduction in the hauling capacity of its engines that may be shown by the evidence. Beyond mere nominal damages it is difficult to adopt any rule for the

admeasurement of any actual damages in such cases. It would involve the consideration of so many collateral facts as would make the claim insisted upon shadowy and uncertain. What is the capacity of defendant's engines to move trains would have to be ascertained by first ascertaining their utmost capacity at the different grades on its entire line of road. This court may take judicial notice of what may be known by common observation. So it may be assumed defendant's main line of road is well nigh, if not quite, three hundred miles in length. To ascertain the capacity of defendant's engines at the most difficult grade on the entire line would necessarily require considerable measurements, and many experiments. When that fact shall have been ascertained, the embarrassment in arriving at a conclusion as to the hauling capacity of such engines at the crossing in question has only been met, but not overcome. Are there no other crossings of other railroads where the law makes it obligatory on defendant to cause its trains to come to a full stop, equally as difficult as this one? Should the difficulty at this point be removed, could they surely pass others, hauling the same number of cars or coaches? But a still more troublesome question remains. Would it be practicable to prove when, or how often, if ever, the necessity would exist to move as heavy trains at this point as elsewhere on defendant's line of road? There may be, and doubtless are, many through trains over defendant's road that would require the same motive power on the entire track, but at what point shall the capacity of its engines be estimated? Shall it be at this crossing, or elsewhere on the road? These and many other difficulties that might be suggested make the class of damages insisted upon too remote, uncertain and shadowy to be considered as an element in the actual damage sustained. The rule on this subject is stated in *Jones v. Chicago & Iowa R. R. Co.*, 68 Ill. 380, to be, that the amount allowed should be sufficient to cover all actual damage by reason of the construction of the road, for the land taken, for all physical injuries to the residue, and for all inconveniences of every character produced; but nothing should be allowed for imaginary or speculative damages, or such remote or inappreciable damages as the imagination may conjure up, and which may or may not occur in all the future. That has been done in this case. All the actual damage defendant will suffer has been liberally compensated by the judgment rendered, but nothing was, and nothing should be, allowed for those possible difficulties and

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embarrassments that may never be experienced by defendant in the profitable and successful transacting of its legitimate business.

The judgment does substantial justice, and must be affirmed, which is done.

Judgment affirmed.

SCHOLFIELD, J. Although concurring in the opinion that appellant is not entitled to recover for damages presumably to be sustained by reason of being compelled by statute to stop its trains before crossing the track of appellee's road, yet since the language here employed does not fully and accurately express my opinion, I prefer to briefly state, in my own way, the views I entertain upon this question.

I am unable to perceive any distinction, in principle, between cases where by statute a railroad company is required to stop its trains before crossing the track of another road, and cases where the same stoppage is rendered necessary by reason of the prior occupancy of the way by the cars on the other road, or by reason of danger of collision with the cars of the other road. In either case, if the company thus compelled to stop its trains has a legal right to continuous and unobstructed passage upon its track, such stoppage must invade that right, and in neither case, if it does not have such right, can there be any legal invasion of a right for which damages can be recovered.

The inquiry then must be, has appellant here shown a *franchise* (that is, a legal property right), to move its cars from one end of its road to the other, without other hindrance or delay than such as was necessitated by the existence of things when its charter was granted? It is not sufficient to show that it has a property right to use its track as a railroad, to the exclusion of all others — no one denies that. But even that is subject to condemnation, and when another road has condemned and paid for the privilege of using so much of that track as is devoted to its crossing, that property in the track is compensated for, and each road then, with reference to that much of what was before the property of the one, is an owner in common with the other, and equally entitled to its use, still leaving the question whether the company whose road is to be crossed, has, in addition to the ownership of its tangible property an ownership in intangible property, consisting of a mere prior right of passage.

It needs no demonstration to prove that mere priority of occupancy or use gives no priority of right to that which is free to all — and this obviously includes the right of locomotion. A railroad company's right of moving its trains differs only from rights of locomotion generally, in that it must always move upon the line of its tracks, and while it has this right, natural individuals and corporations have the same right of locomotion that it has — not upon its tracks, without paying for them, but generally. Neither has precedency, but all are entitled to it as a common right. If this were not so, in a highly improved and old settled country the last comers would find the entire country preoccupied, so that locomotion would be practically, if not literally impossible. The development of the country, its material prosperity, and even the comfort and convenience of the citizens, render it necessary that railroads should be built and operated in every direction, and so necessarily oftentimes crossing each other. And this necessity has always been so obvious that it can never be presumed the legislature has bound its hands in regard to it, by contract in the nature of a grant, in the absence of unmistakable language to that effect — if even then, it could be held to have done so — for it would, in effect, be parting with one of its sovereign rights, which is indispensable to the welfare of the State. See *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

Appellant's charter contains no contract obligating the State not to charter or permit the building of railroads crossing its track, or that passage upon its line of railway shall not be delayed or hindered. It simply creates a corporation, with the usual powers to construct and operate a railroad. In addition therefore to the right to be a corporation, the privilege of running the road and taking tolls for fare and freight is the essential franchise conferred. *Thorpe v. R. & B. R. Co.*, 27 Vt. 146.

If appellant could claim, as a part of its franchise, that it was entitled to pass its cars from one end of its line to the other without any other hindrances, delays or burdens than those in existence when its charter was granted, then any statute subsequently passed, requiring its cars to slacken speed or stop, where before they were not required to slacken speed or stop, or requiring a care and labor not then required, would impair the obligation of the contract evidenced by its charter, and be in contravention of section 10, article 1, of the Constitution of the United States, and hence void. The

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opening of new common highways across railroad tracks necessarily increases the care and labor of the railroad companies in order to avoid collisions. Where villages or cities spring up along the lines of railways, and their streets are laid out across the railway tracks, the care and labor to avoid collisions is very materially increased, and the speed of trains must, of necessity, be to some extent slackened. In all these cases, if the railroad charter is held to amount to a contract that passage upon the line of its railway shall not be delayed, hindered or burdened, the highways and streets cannot lawfully be laid out until the railroad company is compensated for the additional burden it will thus have to bear — nor can the village or city, by ordinance, require the speed of trains to be checked, where compensation for the attendant loss has not been first provided for. This has never been supposed to be the law here, nor so far as we know, has it been held to be the law elsewhere. Statutes and ordinances requiring the checking of the speed of trains, the ringing of bells and the sounding of whistles before crossing highways or streets, or within the limits of cities and villages, have been held reasonable police regulations, without regard to whether the streets or highways were laid out, or the village or city was platted and has been built up since or before the granting of the railroad charter, and without regard to whether compensation has been made to the railroad company for loss or injury thus sustained. Among other cases, see *G. & C. U. R. R. Co. v. Loomis*, 13 Ill. 548; *G. & C. U. R. R. Co. v. Dill*, 22 id. 264; *G. & C. U. R. R. Co. v. Appleby*, 28 id. 283; *Ohio & Mississippi R. R. Co. v. McClelland*, 25 id. 140; *Chicago, Burlington & Quincy R. R. Co. v. Haggerty*, 67 id. 113; and also Cooley's Const. Lim. (4th ed.) 718 *et seq.*

There being no contract, express or implied, giving the elder company priority of mere locomotion, the right of each in this regard is to be enjoyed with reference to the equal rights of all others; and this, it is to be presumed, was intended when the charter was granted appellant. It took its charter subject to the rights of other railroads thereafter to be chartered and built to cross its track, upon making compensation for injury to its property — that is, its soil and track, and other improvements, annexed to the soil, if there are such — with the equal rights of moving trains upon their tracks that appellant has upon its track, neither having priority of right in that regard. And this view has the

sanction of *Massachusetts Central R. Co. v. Boston, Clinton & Fitchburg R. Co.*, 121 Mass. 124; *Old Colony & Fall River R. Co. v. County of Plymouth*, 14 Gray, 155; *Railway v. Railway*, 30 Ohio St. 604.

[Omitting a minor point.]

WALKER, J., concurred with SCHOLFIELD, J. DICKEY and SHELDON, JJ., dissented.

HARRIS v. BOARD OF SUPERVISORS.

(105 Ill. 445)

Constitutional law — limit of legislative power — re-donation of lands on removal of county seat.

To procure the location of a county seat parties made donations of land to the county for the county buildings. Subsequently the county seat was removed, under an act of the legislature which directed the re-donation of the lands and buildings to the donors in proportion to their several donations. *Held*, that the Court of Chancery would order a conveyance accordingly.

BILL to compel conveyance. The opinion states the case. The defendant had judgment below.

Kilgour & Manahan, for appellants.

J. & J. Dinsmoor for appellee.

WALKER, J. In this case appellants filed a bill in chancery, against the board of supervisors of Whiteside county, and others, to have certain real estate standing in the name of Nelson Mason transferred and conveyed to them. The date of the filing of the original bill, or the bill itself, nowhere appears from any thing contained in the transcript of the record filed herein, nor does it appear from any thing filed with the record. The amended bill, a copy of which is brought before us, appears to have been filed in the Circuit Court on the 6th day of January, 1881. To it a demurrer was filed, and on a hearing on the demurrer it was sustained to the amended bill, and it was dismissed. Complainants prayed and perfected an appeal to this court, and the record of the proceedings

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on the amended bill is brought to this court and errors are assigned.

The bill alleges that a part of the complainants were the first settlers on and occupants of certain lands, describing them, and that they became entitled to pre-empptions, and the exclusive right to enter them at the United States land office ; that there then was a tract of land platted as a town site, owned and occupied by the State Bank, and other persons, naming them, known as Chatham ; that contiguous to and on the east side of complainants' lands was another tract, which was platted and owned by Harris & Brink, two of the complainants, and three other persons, known as Harrisburg ; that in the year 1839 the question arose as to the location of the county seat of Whiteside county ; that to induce its location at that place, the proprietors of these towns, and Kilgour, agreed with the county authorities, on condition the county seat should be located and kept there, and the court-house should be built on the lands they lived upon, and to unite the two towns under the name of Sterling, to give the county the right and the money necessary to enter the land they thus occupied, and also to make other donations, being a sixty-acre tract of land, owned by the proprietors of Harrisburg, and \$1,000 in money, and on the part of Chatham, twenty acres of land, adjoining the sixty-acre tract, and \$1,000 in money ; that in 1842 these donations were accepted by the county authorities, and the pre-emption held by Kilgour transferred to the county, and the money necessary for its entry was furnished by the proprietors and other persons, and the county entered the same in its own name, and located the county seat thereon, and with the donations thus given built a court-house on block 57, on the plat of the land thus entered by the county, and the county seat remained at that place, and the building on block 57 was occupied and used as a court-house until 1857, when the county seat was removed to another place ; that since 1857 the county has not used or occupied the court-house on block 57, but in January, 1866, the county conveyed that block to Nelson Mason ; that on the removal of the county seat, by virtue of the agreement donating the land, and the act of the legislature, block 57 reverted to the donors in the proportion of their several donations, and the deed to Mason was made without authority of law ; that a number of the donors had died before the suit was commenced, but their devisees, heirs or assigns are parties complainant. The bill states their interests, and

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the manner in which they were acquired. The several interest of each complainant is particularly set forth in the bill. The bill prays that complainants be decreed to be the owners of the block as tenants in common, according to their several interests therein, and that Mason be decreed to convey the same to them, and on his failing to do so, a conveyance to be made by a commissioner, and that then there be partition of their several interests, and if a partition cannot be made, that the property be sold, and the proceeds be divided among them in proportion to their several interests in the same.

The act to which reference is made in the bill was approved on the 7th day of February, 1857. (Pub. Laws, 238, § 9.) It provides, that "in case the seat of justice of said county shall be removed from Sterling, and located as herein provided for, then the supervisors of said county are hereby authorized and required to convey, by good and sufficient conveyances, the court house and block of land upon which the same is situated and which is now used therewith, and all other lands or town lots heretofore donated to said county for the purpose of erecting said public buildings, and which are still owned and held by said county, to the parties who originally conveyed said property to said county, or to the legal representatives of said parties, in proportion to the donation made by them, respectively, for the purpose of procuring said lands and erecting said court-house." This section gave to each donor to procure the land or to erect the building, as well as to those who donated land, an interest in the court-house and the block of ground on which it stood, in proportion to the amount donated; and the section expressly provides, that in case of the death of any of the donors, their interest shall vest in their representatives. The act therefore confers the right, and having done so, the question of reversion of the title does not arise. It is a legislative grant, and the donors or their representatives do not necessarily take a reversionary interest, but by grant from the general assembly. If this grant became operative to pass title, then it is unnecessary to inquire whether in the absence of the enactment they would have held the title by reversion. It is true complainants allege they hold such an interest, but the bill also claims they hold under this legislative grant.

By the allegations of the bill complainants show that they answer the description of the grantors in the act. It is alleged that they

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or their ancestors made donation to purchase the land and to erect the court-house, and if this is true, and the demurrer admits its truth, they have brought themselves within the terms of the statute. It is said that Mason was a donor. If this be true, and he falls within the provisions of the statute, he can set up and rely upon his rights, and if he establishes them, he will be fully protected therein on a final hearing.

But it is contended that the general assembly had no power to dispose of this property, that it belonged to the county, and was therefore beyond the control of the legislature. The question of legislative power, and its extent, depends on the limitations contained in the Constitution. When a State is created it is invested with complete sovereign power, unless restricted by constitutional limitation, and under our system of government such restrictions are written and embodied in organic law. Were it not for these limitations, the legislative power would be without restriction. When we have to determine whether an act is within the scope of legislative power, we do not look for an express delegation of the power in the fundamental law, but we look to see whether the general power has been limited. The first section of the fourth article of our Constitution vests the legislative power of the State in the general assembly. By it the full, unlimited and uncontrolled legislative power was conferred, and it may be so exercised unless limited by other provisions of that instrument, or its exercise is inhibited by the Federal Constitution; and we may search in vain for any provision in either, prohibiting the general assembly from selling or donating public property. There is no such inhibition.

Counties are mere political divisions of the territory of the State, as a convenient mode of exercising the political, executive and judicial powers of the State. They were created to perform public, and not private, functions. They are wholly public in their character, and are a portion of the State organization. All their powers are conferred and duties imposed by the Constitution and statutes of the State. They are public, and all the property they hold is for public use. It belongs to the public, and the county is but the agent invested with the title, to be held for the public. Were it not for constitutional restrictions, the general assembly might change county seats at pleasure, or it might alter and change county lines, and even abolish counties and create new ones, to suit public convenience or interest. The property held by the county was only

acquired and held by authority conferred by the legislature, and for public use, and the property being held for the public is under the uncontrolled power of the general assembly, as it is not inhibited in its absolute control. The county could neither hold nor dispose of property unless authorized by the Constitution or statute, and the legislature has the power to sell or dispose of it without the consent of the county authorities. It then follows, that the act of the general assembly conferred upon and vested the equitable title in the donors and their representatives, in the proportion each had originally contributed, and the county authorities were expressly required to so convey it to them. According to the allegations of the bill they failed to do so, but conveyed it to Mason.

The demurrer having admitted the allegations of the bill, and they being sufficient to require the relief sought, the court below erred in sustaining the demurrer and dismissing the bill, and the degree must be reversed and the cause remanded.

Degree reversed.

PEOPLE V. APPLETON.

(105 Ill. 474.)

Attorney — disbarring — breach of private trust.

Where property is conveyed in trust to one who is an attorney at law, but the trust is accepted by him as an individual and not as an attorney, and he subsequently mortgages the property for a debt alleged to be due him from the *cestui que trust*, and sells the property and appropriates the proceeds to himself, he may not be disbarred therefor.

PROCEEDINGS to disbar an attorney. The opinion states the case.

Hynes, English and Dunne, for relator.

Edward Roby, for respondent.

SHELDON, J. This is an information on the relation of George R. H. Hughes, filed in this court against Samuel Appleton. asking

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for a rule to show cause why his name should not be stricken from the role of attorneys of this State. The rule having been granted, cause has been shown.

The case presented before us is of this character: In March, 1870, the relator, Hughes, became the owner of a lot of ground in the city of Chicago, known as sub-lot 3, of lot 1, block 3, original town of Chicago, on North Clark street, paying at that time at the rate of \$600 a front foot for the lot, which was twenty-one feet and some inches fronting on Clark street. In April, 1870, he borrowed \$5,000 from the Connecticut Mutual Life Insurance Company, secured by a mortgage on this property. In April, 1874, Hughes' equity of redemption was sold at an execution sale under a judgment in favor of Gookins & Roberts, and bought in by them for the full amount of the judgment, and the sheriff's certificate of sale was issued to them entitling them to a sheriff's deed, July 20, 1875. In May, 1874, after the sale of Hughes' equity in the property, a suit was brought by the Connecticut Mutual life Insurance Company to foreclose under their mortgage, making Hughes and Gookins & Roberts, parties defendant, and a foreclosure sale therein took place on November 17, 1875, which was four months after Gookins & Roberts had become entitled to a sheriff's deed under their certificate of purchase in 1874. At the instance of Hughes, Thomas B. Bryan became the purchaser of the property at this foreclosure sale, Hughes loaning him \$6,000, taking a mortgage to secure \$5,000 of the money on the property, and \$1,000 being secured by a mortgage on other property of Bryan, the latter giving his notes for the \$6,000. Subsequently Bryan requested Hughes to buy the property back from him for the price which he had paid for it, and surrender his notes, which Hughes did, and instead of taking the deed in his own name, he had Bryan, on June 16, 1878, make the conveyance of the property to Appleton, the respondent, the latter executing to Hughes a written declaration of trust, which Hughes retained without recording. Shortly after the lot was conveyed to Appleton, efforts were made by Hughes and Appleton to obtain a building loan for the purpose of improving the property, these efforts extending to October, 1878, when the project of raising a building loan was abandoned. On December 11, 1878, Appleton secured a loan of \$1,000 by mortgaging the lot to one Wright, which was done without any communication with Hughes on the subject. Again on May 7, 1879, Appleton obtained

a loan of \$1,500 on the lot, executing a trust deed to one Snowhook to secure the same, and took up the Wright mortgage,—and this also without any communication with Hughes. And again on February 24, 1880, Appleton conveyed the lot to Frank H. Dickey by warranty deed for the expressed consideration of \$4,000, subject to the Snowhook incumbrance of \$1,500,—and this without the direction of Hughes. On February 25, 1880, one Pease, as assignee of the Gookins & Roberts certificate of purchase, filed a bill in the Superior Court of Cook county, making Appleton and Hughes parties defendant, laying claim to the proceeds of the property, and praying the court to restrain Appleton from paying them over. To this bill Hughes demurred, which demurrer was sustained, and leave given to amend the bill. Afterward the Pease bill was dismissed, and within a few days a new bill was filed by Pease in the Circuit Court of Cook county, in which Appleton and Hughes, and the Connecticut Mutual Life Insurance Company, were made parties defendant. Hughes filed his cross-bill setting forth his claim and asking a conveyance from Dickey, or if that should not be, a decree against Appleton for the value of the property. This second suit is still pending and undetermined. It was commenced June 19, 1880, and on November 22, 1880, it was dismissed as to Dickey, and a few days thereafter Dickey conveyed the lot to Eugene Pike.

The claim on the part of the relator is, that the trust with respect to the property in question was a matter of professional employment; that the acceptance of the trust and the action under it was in the capacity of an attorney at law; that the mortgaging of the lot, and the sale of it afterward, was all an iniquitous fraud perpetrated for the purpose of wronging relator out of his property, and dishonestly appropriating it to the use of respondent; that the Pease suit to restrain the paying over of the proceeds of the property was but a sham and a device of respondent in his scheme of fraud to furnish a pretext for the withholding of such proceeds. The respondent insists, on the contrary, that this trust was not professional, but private business, and that all his conduct was honest and with rightful motive; that he had made disbursements, incurred liabilities, and performed services with respect to the property, to an amount exceeding that of the mortgages he placed upon the lot; that relator was insolvent; that respondent made application to him for payment, but could get nothing; that he told relator if he did

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not pay him respondent would secure himself on the property; afterward he borrowed \$1,000, thinking that might suffice for his need, and gave the first mortgage, but finding that he needed an additional \$500, he obtained a loan of \$1,500 on the lot, gave the second mortgage, and took up the first one; that the money thus raised was no more than the amount of what he regarded as justly his due, and he thought himself justified in thus securing his pay; that the sale of the property was made with the approval of relator and that he had no connection with the bringing of the Pease suit. Both the parties give testimony in support of their respective claims.

We concur in the view of the respondent that the trust which was undertaken in this case was not under any professional employment. Relator's own testimony would seem so to mark it. He says: "On 6th of July, 1878, I made a purchase from Thomas B. Bryan of a lot on North Clark street, for \$6,000. After making my terms with Mr. Bryan at the Fidelity Safety Deposit vaults, I left Mr. Bryan and called on Mr. Appleton, at his office; mentioned to him that I had just made this purchase; that as he had been trustee in a previous transaction, and particularly as I was anxious to avoid harassment through the old Gookins & Roberts judgments, and as I wanted to get up a building as quick as possible, and to that end raise a loan on the lot, I called to ask him if he would receive the title in trust by conveyance from Mr. Bryan. He said that he would gladly serve me in the matter, and accept the title in trust." Thus it will be seen that the deed was not made under any legal advice from respondent, but relator had of himself determined upon it beforehand. It was a very simple matter, the having of a deed for land made in another person's name, not giving occasion for legal advice, and relator not needing it from respondent, they both being attorneys, and the relator some fifteen years the senior in the practice of law. To hold a title in one's own name requires no skill of an attorney. There had been no previous relation of attorney and client, and that which arose between the parties from the transaction in question we regard as not being the relation of attorney and client, but that of trustee and *cestui que trust*.

It is remarked upon as showing professional employment that respondent charged a fee of \$10 to relator on the books of Rogers & Appleton, attorneys at law, for the business he did the day he accepted the trust. Without going through with it, we will say that

Mr. Rogers' explanation how this charge came to be made several months afterward, is satisfactory to us that little significance should be attached to this as evidence of the rendering of professional services. Mr. Rogers says distinctly that they never had an account with relator.

From an examination of all the testimony we can come to no other conclusion than that respondent accepted this trust, not as an attorney at law, but simply as an individual, and that whatever of wrongful conduct there may have been, it was but that of any ordinary trustee, and not professional misconduct in the office of an attorney at law. In a similar proceeding against an attorney in *The People v. Allison*, 68 Ill. 151, this court said: "If respondent has been guilty of the misconduct alleged against him, in his private character, and not in his official capacity as an attorney, relief can only be obtained by a prosecution in the proper court, at the suit of the party injured. He cannot be tried on motion, in this summary manner." There are many authorities for the support of the doctrine thus laid down. Among them we refer to *In re Atkin*, 4 B. & Ald. 47; *Cocks v. Harman*, 6 East, 404; *Matter of Dakin*, 4 Hill, 42; *In re Husson*, 26 Hun, 130; *Matter of Haskin*, 18 id. 42.

We think the present comes within the class of cases above referred to, wherein the exercise of this summary jurisdiction would not be entertained where the misconduct alleged was not in the employment as attorney. But though such be the general rule, it is not to be held that there are no exceptions—that there are not cases where an attorney's misconduct, in his private capacity merely and not in his official capacity, may be of so gross a character that the court will exercise the power of disbarment. There is too much of authority to the contrary to say that. Is the present case one of such character?

As the case is presented on the part of the relator it is quite an aggravated one but there are favoring circumstances for respondent which mitigate the case as thus presented. The misconduct alleged is in the mortgaging of the property, the making sale of it, and withholding the proceeds upon the pretext of the Pease suit, fraudulently got up as alleged by the respondent himself, for that purpose. There is no question that respondent made disbursements and incurred liabilities in respect of the property. Plans and specifications for building were made and changed, and differ-

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ent architects engaged in the matter. Successive loans for building were negotiated for by different brokers. Liabilities were thus incurred by respondent, he being the ostensible owner. One architect was threatening him with a suit for \$100. Some \$164 of taxes were paid by respondent. Very much of respondent's time during some five months was occupied by relator in relation to the matter,—so much of it, Mr. Rogers testifies, that he required that respondent should allow the firm \$500 for the amount of time which had thus been taken from the firm's business; that this was done, and respondent was charged for that amount on the books,—not as being the amount which relator should pay, but as the sum which as between themselves should be charged against respondent. There was evidence, coming from the relator himself, that he agreed to pay respondent for his services, and some evidence tending to show that it should be suitable compensation for a lawyer's time thus occupied. Upon the hypothesis of such an agreement, and the amount of time spent, which there was disinterested evidence tending to show was spent, respectable witnesses testified that the compensation should be \$1,000 or more. As to such compensation if any were due, there might honestly be quite a difference of opinion. It cannot be said that the claim of respondent was wholly baseless. It was a just one for some amount, and if nothing could be obtained from relator upon it, and respondent stood in need of the money, and informed relator that he would secure himself on the property, the resort afterward to a mortgage upon the property of \$1,500, for the purpose of securing his pay, however unjustifiable it might have been, cannot be pronounced to be a transaction of such moral turpitude as to demand respondent's expulsion from the bar, as being unfit to practice his profession. Wrong conduct there may have been, and not the corrupt intent charged.

As to the sale on the lot, independent of respondent's testimony that it was with the approval of relator, there is evidence that respondent was making efforts to sell the lot with relator's concurrence. There is in the case a letter from respondent to relator, of date December 13, 1879, saying: "Your price for selling I find too high for the market. Shall I reduce it to \$4,500? Why don't you come in?" Respondent's excuse for selling the lot as he did was that he had just before received a letter from Mr. Wakeman, the solicitor for complainant in the Pease cause, threatening suit on the Roberts claim; that he made an ineffectual effort to see re-

lator, and thought it best for the protection of the property to make sale of it, as he did, without any delay. Wakeman was a witness, and he is not inquired of as to the sending of such a letter, so we think it may be taken that such a letter was sent. As to the lot being sold at a greatly inadequate price, as claimed, several witnesses testify that it was sold for its market value. We can hardly say there was corrupt conduct in making this sale.

As to respondent having caused the Pease suit to be brought for the fraudulent purpose alleged, all the evidence thereof seems to be the quickness with which the bill was filed after the sale, being on the next day, and its being drawn by Mr. Burrows, and then brought to Mr. Wakeman, who signed it as solicitor; and the latter would seem to have had no other connection with the bringing of the suit than thus signing the bill. From bringing the suit so soon after the sale, it requiring considerable time to prepare such a bill, it might be a just inference that Burrows or Pease had notice that the sale was to be made, some time beforehand, but there would be no proper inference of any thing further. Mr. Burrows had some relation of intimacy with respondent, having had employment in the office of Rogers & Appleton for some of the time during the summer and fall of 1879. These were suspicious circumstances, but they do not amount to the satisfactory evidence which is required in such case of the charge alleged, that this Pease suit was all a sham and fraudulent contrivance on the part of respondent to enable him to keep in his hands the proceeds of the sale of the lot.

As to the Roberts claim, and the Pease suit brought upon it being so utterly groundless as claimed, that they should have been no obstacle to paying over this money, it is to be remarked that relator had been told by a lawyer of eminence that if he bought the lot at the insurance company's foreclosure sale, the title might inure to Gookins & Roberts, under their judgment against relator and purchase at execution sale of the equity of redemption. It was on account of this that relator had the Bryan deed made to respondent, instead of to himself. When one of the building loans had been arranged for, it was found that in order to its completion the abstract of title would have to go into the hands of the attorneys who obtained the Gookins & Roberts judgment. Relator for that reason dropped the loan. Relator himself thus entertaining real apprehension in regard to the Gookins & Roberts claim, it would not seem to be for him to say that respondent's apprehension concern-

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ing it is but a mere pretense, and impute it as dishonest and corrupt conduct in him to be unwilling to pay over the proceeds of the sale of the lot whilst that Pease suit was pending against him. Efforts were made for settlement. The ultimatum which relator announced to respondent was, that the latter should pay \$8,000, with nothing for his disbursements or services. The controversy was the proper subject matter of a bill in equity. It may, and should be settled in the pending Pease suit.

We have not attempted to enter into a detail of the evidence with any fullness, and have but adverted to some favorable circumstances to show that the present is not a case of such gross misconduct of an attorney in his private capacity as to call for the proceeding against him for disbarment.

We are of opinion the rule ought to be discharged.

Rule discharged.

MULKEY and WALKER, JJ., dissenting.

McMAHILL V. McMAHILL.

(105 Ill. 566.)

Homestead — release of right of, by ante-nuptial contract.

A widow's homestead right cannot be barred by ante-nuptial contract.

BILL for partition. The opinion shows the point. The widow prevailed below.

Stewarts & Grier, for appellant.

H. Chrisman and Porter & Porter, for appellee.

SCOTT, C. J. It will be perceived the Circuit Court found, and so decreed, that the ante-nuptial agreement between the parties was valid, and obligatory upon defendant, and was effectual to cut off or bar her dower in the lands of her late husband, the ancestor of complainants. Touching that decision defendant has assigned no cross-errors, and of course can make no complaint in this court. The only question therefore that remains to be considered is,

whether the ante-nuptial contract cut off or barred defendant's claim to homestead in the premises on which she and her late husband resided, and which she has not since abandoned. The heirs claiming the estate are children of the decedent by a former wife. Defendant had no children after her second marriage. Nor does it appear that any of her husband's children are minors, residing with her. The claim put forth is to the right of homestead, under the statute, in lands on which she and her husband resided in his lifetime, as his widow, unaffected by any collateral considerations.

Section 1 of the Homestead act, in force July 1, 1873, secures to every householder having a family an estate of homestead in the farm or lot occupied by him or her, which can only be extinguished in the mode provided in a subsequent section of the act; and section 2 of the same act provides such exemption shall continue after the death of such householder for the benefit of the husband or wife surviving, so long as he or she shall continue to occupy such homestead. Only two modes are provided by which the homestead right or estate may be extinguished: First, by a release, waiver or conveyance in writing, subscribed by such householder and his wife, or her husband, if he or she has one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged; or second, by conveyance of the premises, with abandonment or giving up of possession. It is further provided in the act concerning conveyances, in force July 1, 1872, that no deed or other instrument shall be construed as releasing or waiving the right of homestead, unless the same shall contain a clause expressly releasing or waiving such right, and in such case the certificate of acknowledgment shall contain a clause substantially as follows: "Including the release or waiver of the right of homestead," or other words which shall expressly show that the parties executing the deed or other instrument intended to release such right. These provisions of the statute show that homestead is a right secured to both husband and the wife, and is one of which they cannot be dispossessed except by their voluntary action in the mode pointed out by statute. It is protected by the strongest guaranties of the law, and no release or waiver of such right shall be construed as valid, unless acknowledged as required by the Conveyance act. After her marriage defendant enjoyed the homestead of her husband, and after his death the law continued it in her favor so long as she should choose to occupy it. It is obvious she could not con-

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tract, after marriage, by any written instrument not executed in conformity with the statute, to release her homestead, that would be binding upon her after the death of her husband. How then could she do it before marriage? If a contract to release homestead, not conforming to the statute, made after marriage, is not valid, certainly such a contract made before marriage, for still more cogent reasons, would be without binding obligation. The policy of the law is, as this court has had frequent occasion to declare, to preserve the homestead for the benefit of the party or parties entitled to it. It has been said the statute was enacted from motives of public concern, and that parties will not be permitted, by ante-nuptial agreements, to annul its beneficent provisions designed to subserve the common welfare. In *McGee v. McGee*, 91 Ill. 548, it was held the homestead right could not be barred by an ante-nuptial contract. In that case there were children of the parties, but it is apprehended that fact would not change the basis of the decision. The principle is, the statute secures the homestead to the husband or wife surviving, and such right can only be extinguished in the mode provided by the statute. It cannot be done by an ante-nuptial agreement, for the simple reason that it is not one of the modes provided by statute by which such right may be extinguished. In *Phelps v. Phelps*, 72 Ill. 545, it was held the ante-nuptial agreement between the parties barred dower, but did not prevent the widow from sharing in the provisions the law made for the benefit of the family and herself. It was for the reason that the provision the law made for her and the family could not be abrogated by private contract. It was thought to be a matter of public concern, for which the legislature could well provide for its permanent security. The case being considered is within the principle of the cases cited, and the decree of the Circuit Court will be affirmed.

Decree affirmed.

SHELDON, SCHOLFIELD and CRAIG, JJ., dissenting.



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ATTORNEY.

1. **Disbarring — breach of private trust.]** Where property is conveyed in trust to one who is an attorney at law, but the trust is accepted by him as an individual and not as an attorney, and he subsequently mortgages the property for a debt alleged to be due him from the *cestui que trust*, and sells the property and appropriates the proceeds to himself, he may not be disbarred therefor. *People v. Appleton* (Ill.), 812.
2. **Liability for officer's fees.]** The attorney in a cause is presumptively liable for sheriff's fees on writs delivered by him for service. *Heath v. Bates* (Conn.), 234.

BAIL.

When excused from surrender by re-arrest.] Bail in a criminal case are discharged from liability by the arrest of the principal upon the same charge in the same State by the Federal authorities, and his incarceration in another State. *Commonwealth v. Overby* (Ky.), 471.

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BANK.

1. **National — jurisdiction of action against.]** An action may be prosecuted in a State court against a National bank situated in another State, and an attachment may issue before judgment. *Holmes v. National Bank of Wilmington* (S. C.), 558.
2. **Payment of check.]** A bank, not accustomed to receive, for collection, checks drawn upon itself, received a check drawn by one of its depositors in favor of another, credited it in the payee's pass-book, put it on the file of paid and cancelled checks, and credited the payee and charged the drawer with it in the books of the bank. *Held*, that this constituted payment, and could not be retracted on discovering that the check was an overdraft and the drawer was insolvent. *City National Bank of Selma v. Burns* (Ala.), 188.

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1. **Common — rates of charges.]** A common carrier is not bound to transport goods at the same rates of charges for all. *Ex parte Benson* (S. C.), 564.
2. **Railroad — duty in respect to passengers at eating stations.]** Railway companies are bound to afford to passengers on long routes easy and safe modes and reasonable time for obtaining food, and safe ingress and egress to and from refreshment stations, whether controlled by the company or by others; and where a passenger sustains injury on returning from such a station to the train by want of sufficient light and the removal of the train without notice in his absence, the company is liable. *Peniston v. Chicago, St. Louis and New Orleans Railroad Co.* (La.), 444.

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1. **Estoppel.]** A wife's right of recovery under the Civil Damage Act is not affected by the fact that she had signed the defendant's petition for a dram-shop license. *Jockers v. Borgman* (Kans.), 625.
2. **Exemplary damages.]** In an action under the Civil Damage Act exemplary damages may be awarded although the defendant is also liable to criminal punishment. *Id.*

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CONSTITUTIONAL LAW.

1. **Conclusion of indictment.]** An indictment concluded, "against the peace and dignity of the State, this the third day of November, 1893." *Held*, a violation of the constitutional provision that indictments shall conclude "against the peace and dignity of the State." *Hawn v. State* (Tex.), 706.
2. **Discrimination in punishment of adultery by mixed races.]** A statute prescribing for the offense of living in adultery or fornication, when committed by a negro and a white person together, a different punishment from that prescribed when the offense is committed by two white persons or two negroes, is not unconstitutional. *Pace v. State* (Ala.), 513.
3. **Inter-State commerce — regulation of freight charges.]** A legislative enactment fixing rates of charges for freight over railroads within the State cannot be applied to contracts for transportation from the State to points in other States. *Carton v. Illinois Central Railroad Company* (Iowa), 672.
4. **Interference with private property.]** A statute declaring it unlawful, within certain counties, to transport or move after sunset and before sunrise of the succeeding day any cotton in the seed, but permitting the owner or producer to remove it from the field to the place of storage, is not unconstitutional. *Davis v. State* (Ala.), 128.
5. **Limitation of municipal indebtedness.]** Where the Constitution forbids any municipal corporation to become indebted beyond a certain amount "in any manner or for any purpose," that amount may not be exceeded even for necessary current expenses. *Prince v. City of Quincy* (Ill.), 785.
6. **Limit of legislative power — re-donation of lands on removal of county seat.]** To procure the location of a county seat parties made donations of land to the county for the county buildings. Subsequently the county seat was removed, under an act of the legislature which directed the re-donation of the lands and buildings to the donors in proportion to their several donations. *Held*, that the Court of Chancery would order a conveyance accordingly. *Harris v. Board of Supervisors* (Ill.), 808.
7. **Prohibitory liquor law — effect as to prior manufactures.]** A law prohibiting the brewing and selling of beer applies to beer lawfully brewed before the law took effect but sold thereafter. *State v. Mugler* (Kans.), 634.
8. — The legislature may make it a misdemeanor to sell intoxicating liquor within two miles of the State prison grounds, or within one mile of the State insane asylum, or within one mile of the grounds of the State University, or in the State capitol, or upon the grounds belonging thereto. *Ex parte McClain* (Cal.), 554.
9. **Railway in street.]** When the fee of a street is in the public, the legislature, either directly or through the municipal authorities, may authorize the construction of a steam railway therein. *Harrison v. New Orleans & Pacific Railway Company* (La.), 488.

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10. Regulation of foreign insurance companies.] A statute providing that insurance companies of other States, seeking to do business here, shall pay to the insurance department for taxes, etc., an amount equal to that exacted by "existing or future laws of such other States from companies of this State seeking to do business there," is not unconstitutional, although such amount may be greater than that required by other existing laws of this State. *People v. Fire Association of Philadelphia* (N. Y.), 880.
11. Separate taxation of corporate property and shares.] The legislature may authorize the taxation of a toll bridge against the corporation, and of the shares of the stock of the corporation against the stockholders. *Cook v. City of Burlington* (Iowa), 679.

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Power to punish summarily.] When the statute provides no mode of punishing a contempt, the court may punish it summarily, without indictment. *Arnold v. Commonwealth* (Ky.), 490.

CONTRACT.

1. Consideration.] The consideration of love and affection alone will not warrant a decree of specific performance. *Keefer v. Grayson* (Va.), 171.
2. Time, when of essence — specific performance.] G. leased land to his son-in-law for a term of years at an annual rent. During the term he promised in writing that if the lessee by a specified time would pay the arrears of rent and all the rent to accrue, and certain other amounts due him, he would, in consideration of love and affection for his daughter, convey the land in fee for her separate use. The lessee made the payments, but not within the specified time. *Held*, that specific performance would not be decreed. *Id.*
3. To waive statutory liability of master and servant.] A railroad company may not contract in advance with its employees for the waiver and release of the statutory liability imposed on such companies for negligence of one employee causing injury to another employee without regard to the negligence of the company. *Kansas Pacific Railway Company v. Peasey* (Kans.), 680.

To evade penal liability.] *See* TELEGRAPH COMPANY, 776.
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CORPORATION.

1. **Agency — ratification.]** The cashier of a bank, having agreed to discharge his duties without compensation, appropriated funds of the bank for compensation. Knowing that the rules of the bank forbade interest on demand certificates, he issued demand certificates on interest to himself, and took funds of the bank to pay such interest. He also sold bonds belonging to the bank to himself for less than their value. These transactions were entered on the bank books, but the directors had no actual knowledge thereof. *Held*, that a ratification by the bank could not be implied. *First Nat. Bk. of Fort Scott v. Drake* (Kans.), 646.
 2. **Dividends — capital or income.]** Where a corporation makes a dividend of the proceeds of a sale of part of its original franchise and property, it will be regarded, as between a life-tenant and a remainderman of part of the stock, as capital and not as income. *Vinton's Appeal* (Penn.), 116.
 3. **Implied warranty on sale of stock of.]** On a sale of shares of corporate stock there is no implied warranty that the stock has not been fraudulently issued by the officers in excess of the amount authorized by the charter. *People's Bank v. Kurts* (Penn.), 112.
- Taxation of.]** See CONSTITUTIONAL LAW, 679.

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See CONSTITUTIONAL LAW, 806.

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CRIMINAL LAW.

1. **Admission by silence.]** On a trial for murder it is error to admit evidence of an accusation of the prisoner made by the deceased in his presence, after his arrest, and of the prisoner's silence. *State v. Dicks* (La.), 448.
2. **Aiding and abetting manslaughter.]** An indictment will lie for being present and aiding and abetting manslaughter. *State v. Putman* (S. C.), 569.
3. **Appeal of escaped convict.]** The court will not hear the appeal of an escaped and convicted prisoner, not on bail. *McGowan v. People* (Ill.), 87.
4. **Assault with intent to commit manslaughter.]** There may be an assault with intent to commit manslaughter. *State v. Connor* (Iowa), 666.
5. **Bigamy — statutory construction.]** The statute of bigamy prohibits the marriage of any one "having a husband or wife living." The statute of divorce prohibits the re-marriage, during the life-time of the complainant, of any person against whom a divorce has been obtained. *Held*, that one

CRIMINAL LAW — *Continued.*

who marries in this State in violation of the latter prohibition is guilty of bigamy. *People v. Faber* (N. Y.), 357.

6. Burden of proof of insanity.] When insanity is set up as an excuse for crime, the burden of proof is on the accused, and the defense must be proved beyond a reasonable doubt. *State v. DeRancé* (La.), 426.
7. Confession — when not voluntary.] The confession of an accused person while in the hands of his captors, not officers, and with a rope about his neck, is not free and voluntary, and is inadmissible in evidence. *State v. Revells* (La.), 486.
8. Evidence — compelling prisoner to exhibit his person.] On a trial for murder, the extent of an amputation of one of the prisoner's legs being a material question, it is error to compel the prisoner to exhibit his leg to the jury. *Blackwell v. State* (Ga.), 717.
9. False pretenses — statement of residence — laches.] A false and fraudulent statement by the defendant of his place of residence does not amount to a false pretense unless it is shown that the other party relied thereon, and that it formed a controlling inducement; but it is no defense that inquiry would have defeated the attempt to deceive. *Woodbury v. State* (Ala.), 515.
10. — obtaining money for charity.] An indictment charging that the defendant, with intent to defraud, by falsely and fraudulently pretending to be a member of a Masonic lodge in Ohio, that he was on his way to a funeral, and was out of money, and by exhibiting a forged receipt from the Ohio lodge for dues, obtained money from a lodge of Masons in Indiana, upon a promise to repay the same, is good on motion to quash. *Strong v. State* (Ind.), 292.
11. — evidence of other frauds.] Evidence that the defendant had by similar pretenses, at another time and place, defrauded another Masonic lodge, is inadmissible, because such evidence is never admissible except upon the issue of intent, and here intent is not in issue because the representations were peculiarly within the defendant's knowledge, and if false must have been fraudulently intended. *Id.*
12. Homicide in defense of property.] Homicide in defense of one's property is justifiable when necessary to defeat or prevent a felonious aggression thereon. *People v. Flanagan* (Cal.), 52.
13. Nuisance — excessive speed of railway trains at highway crossing — contributory negligence.] It is an indictable nuisance for a railroad company to run trains across highways at a speed of fifteen or twenty miles an hour, without warning. The doctrine of contributory negligence is inapplicable. *Louisville, Cincinnati & Lexington Railroad Company v. Commonwealth* (Ky.), 468.
14. Occupation tax — illegal sale of intoxicants.] The conductor of a Pullman palace car, licensed as a hotel car, retailed intoxicating drinks to passengers at a bar in the car. The occupation tax levied upon retail dealers in spirituous liquors had not been paid by himself or the car company.

Held, that he was liable to the penalty provided for violation of the occupation tax law. *LaNorris v. State* (Tex.), 690.

15. Once in jeopardy — plea of guilty by duress.] A person accused of murder had when arraigned pleaded not guilty. There were threats and danger of lynching which terrified him and his counsel, by reason of which, and at the urgent solicitation of his counsel, he withdrew his first plea and pleaded guilty, and was sentenced. *Held*, that he was entitled to a new trial. *Sanders v. State* (Ind.), 29.
 16. Possession of stolen property.] To justify the inference of guilt from the possession of stolen property it must appear that the possession was personal. The bare fact that stolen hides were found in the defendant's barn, which was open to all, affords no presumption of his guilt, and until his declaration of ignorance is shown to be false, he is not bound to explain how they came there. *People v. Hurley* (Cal.), 55.
 17. Verdict — bailed prisoner not present at.] A defendant indicted for felony, released on bail and voluntarily absent from the trial, may not complain of the reception of the verdict in his absence, especially when his counsel is present and answers for him. *Barton v. State* (Ga.), 743.
 18. — misspelled.] A verdict of "guilty of murder in the first degree" is invalid. *Woodriddle v. State* (Tex.), 708.
 19. Witness — husband and wife.] Under a statute permitting husband or wife to testify the one against the other in a criminal prosecution for an offense committed by one against the other, the wife is not competent against the husband on a prosecution against him for incest with her daughter, his step-daughter. *Compton v. State* (Tex.), 708.
- Conclusion of indictment.] See CONSTITUTIONAL LAW, 706.

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See MORTGAGE, 532; REPLEVIN, 124.

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See MUNICIPAL CORPORATION, 313.

DAMAGES.

1. Conjectural. In an action on an attachment bond, a witness may testify to the extent of a merchant's business, and the rate or average of his net profits, if within his knowledge, but may not give his opinion as to the loss he will suffer by the breaking up of his business; nor is it competent to show that by reason of the stopping of his business he lost advances that he had made, and possible profits on shipments of merchandise. *Pollock v. Gantt* (Ala.), 519.
2. Agency.] Where an attachment is sued out by an agent without authority but the principal does not repudiate the suit, the principal is liable for actual damage. *Id.*
3. Contract to deliver specific articles.] One who breaks his unconditional

DAMAGES — Continued.

- contract to deliver specific property is liable in damages for the value of the property. *Cummings v. Dudley* (Cal.), 58.
4. **Exemplary — in assault and battery.]** Exemplary damages may be proper in a case of assault and battery, although no actual malice is shown. *Borland v. Barrett* (Va.), 152.
5. **For failure to repair fences.]** A landlord agreed in a lease of a farm to repair the fences so as to secure the crop. He failed to do this, and cattle broke in and injured the crops. Held, that he was liable therefor. *Outer v. Hill* (Ala.), 134.
- See* CIVIL DAMAGE ACT, 635; EMINENT DOMAIN, 799; TELEGRAPH COMPANY, 589, 610.

DEED.

- Marriage — tenancy by entirety.]** Under a joint conveyance to husband and wife they hold as tenants by the entirety, and the survivor takes the whole estate, notwithstanding the married women's enabling statutes *Bertles v. Nunan* (N. Y.), 361.

DELIVERY.

- See* NEGOTIABLE INSTRUMENT, 187.

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- See* WILL.

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- See* INFANCY, 263.

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- See* ATTORNEY, 813.

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- See* CORPORATION, 116.

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- See* MARRIAGE, 81, 101, 408, 483.

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- See* EASEMENT, 165.

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- Plea of guilty by.]** *See* CRIMINAL LAW, 29.

- See* NUISANCE, 642.

EASEMENT.

1. **Drainage.]** A proprietor, owning two estates, Woodlawn and Fairfield, and draining the former by ditches through the latter to a river, granted

Woodlawn in 1811 to the plaintiff's grantors, and devised Fairfield in 1830 to the defendant's grantors. The deed and will were silent about draining. When Woodlawn was granted the ditches were open and visible, and had been almost continuously used, they were necessary to the proper enjoyment of the premises, and there was no other way of draining except at large expense. *Held*, that defendant should be enjoined from stopping up the ditches on his own land. *Sanderlin v. Baxter* (Va.), 185.

2. In wall on another's land.] Where a wall of a house stands wholly upon the land of another, and is essential to the support of the house, the latter cannot remove or impair it, both owners having bought from the common owner and with knowledge of the situation of the wall. *Henry v. Koch* (Ky.), 484.

EMINENT DOMAIN.

Damages — railroads crossing each other.] In a proceeding for the condemnation of a right of way for a railroad across another railroad, no damages may be allowed on account of the statutory requirement to stop trains at such crossings, and the consequent impairment of the hauling capacity of the engines, such requirement being a police regulation subject to legislative repeal, and such damages being too vague and indefinite for computation. *Chicago and Alton Railroad Company v. Joliet, Lockport and Aurora Railroad Company* (Ill.), 799.

ENTIRETY.

See DEED, 361.

ESCAPE.

Of criminal, effect on appeal.] *See CRIMINAL LAW*, 87.

ESTOPPEL.

Voluntary payment—ignorance of law.] Where two parties claimed the same land under a will, and with knowledge of all the facts collected and voluntarily divided the rents and profits, neither can subsequently recover therefor from the other. *White v. Rowland* (Ga.), 731.

See CIVIL DAMAGE ACT, 625.

EVIDENCE.

1. Comparison — handwriting.] Comparison is competent as a means of ascertaining the genuineness of handwriting, when introduced in aid of doubtful original proof or when the evidence is conflicting, and the witnesses making the comparison need not be expert. *Benedict v. Flanigan* (S. C.), 583.
2. Of former accidents and subsequent repairs, in action of negligence.] In an action against a railway company for an injury to a horse at a defective highway crossing, evidence of former similar accidents at the same place is inadmissible; and so of evidence that after the accident the com-

EVIDENCE — *Continued.*

- pany repaired the defect. *Hudson v. Chicago and North-western Railroad Company* (Iowa), 602.
3. Of debt — due-bill of decedent found among his papers.] A due-bill signed by a decedent and found among his private papers after his death is not alone sufficient evidence of a debt, but may be so when coupled with confidential instructions, oral and written, to his executor, to pay the same. *O'Neill v. O'Neill* (S. C.), 579.
4. Of other similar suits and acts.] In an action by a woman for assault and battery with lecherous intent, evidence is inadmissible to show a former similar charge by her against another man, and her acceptance of money in compromise; or that the defendant had made like assaults on other women. *Ogle v. Brooks* (Ind.), 778.
5. Parol — of contents of telegram.] In an action of damages for non-delivery of a telegraphic message, parol evidence of the contents of the message is competent without notice to produce the original. *Reliance Lumber Company v. Western Union Telegraph Company* (Tex.), 620.
6. — to establish contemporaneous oral agreement.] A written lease of a hotel having been executed, parol evidence is competent to establish a contemporaneous oral agreement by the lessor, in consideration of the lease, not to engage in a rival business in the same city. *Weis v. Rhodius* (Ind.), 747.
7. Reading scientific book to jury.] On the argument of a murder trial the district attorney, against objection, was permitted to read to the jury extracts from "Browne's Medical Jurisprudence" on the subject of insanity. There was no evidence that it was standard or scientific. *Held error.* *People v. Wheeler* (Cal.), 70.
8. Surgical examination, when ordered.] In an action of damages for permanent injury to the eyes, the plaintiff having testified, and no medical expert having testified, the court may order the plaintiff to submit to an examination by a competent expert. *Atchison, Topeka and Santa Fe Railroad Company v. Thul* (Kans.), 659.

Of admission.] *See* CRIMINAL LAW, 448.

Confession.] *See* CRIMINAL LAW, 436.

Confidential communication.] *See* INSURANCE, 372.

Criminal presumption.] *See* CRIMINAL LAW, 55.

Of custom.] *See* MUNICIPAL CORPORATION, 218.

Exhibiting person.] *See* CRIMINAL LAW, 718.

Of other frauds.] *See* CRIMINAL LAW, 292.

Of insanity — burden of proof.] *See* CRIMINAL LAW, 426.

Parol.] *See* WILL, 158.

Presumption.] *See* INFANCY, 249.

See WITNESS, 97.

EXECUTION.

1. Exemption — waiver — bail in bastardy.] Replevin bail on a judgment in bastardy proceedings is entitled to the benefit of the exemption law. *Maloney v. Newton* (Ind.), 46.
2. — "Tools and apparatus" — printer's press, types and cases.] A printing press, types and cases are exempt from forced sale as "tools and apparatus of trade or profession." *Green v. Raymond* (Tex.), 601.

EXEMPTION.

See EXECUTION, 46, 601 ; SET-OFF, 267.

FALSE PRETENSES.

See CRIMINAL LAW, 292, 515.

FENCES.

See DAMAGES, 134.

FORMER ADJUDICATION.

Bar.] In an action against two surgeons for malpractice, an answer by one, that on a trial on the merits before a justice of the peace he had obtained judgment for his services in the matter in question, is a good defense ; and a reply that the action for malpractice was pending when the other was commenced is bad. Otherwise if the suit before the justice was undefended. *Goble v. Dillon* (Ind.), 308.

FRAUD.

1. Sale — confidential relations.] The defendant had been a trusted laborer in the service of A. in taking care of oyster beds. Seven years after he left the service, but while he was on friendly terms with A., the latter became feeble in mind and unable to manage his own affairs, and his wife, intelligent and capable, transacted them for him. The wife, on the defendant's advice and by defendant's agency, sold part of the oyster beds, and wishing to sell the rest, the defendant offered to buy them, and she said he might have them if he would pay as much as any one else. The defendant then offered \$200, although he knew they were worth \$500. The sale was completed on those terms, the wife believing the defendant honest and friendly and that he would offer a fair price, and making no inquiry, and he knowing her reliance. *Held*, that the sale should not be set aside. *Hemingway v. Coleman* (Conn.), 248.
2. Gift — confidential relations.] When a young man, who had impaired his mind and body by dissipation, gave all his property, to the exclusion of his kindred, to a prostitute, who had a strong influence over him, and with whom he had lived as a husband under a marriage ceremony void by reason of her prior marriage to another still living, the deed was set aside, for the reason that if the grantor believed his marriage to be valid the deed was fraudulent, and if he knew the marriage to be void it was founded

FRAUD — *Continued.*

on the illegal consideration of illicit intercourse. *Shipman v. Furniss* (Ala.), 528.

Marriage — concealed pregnancy.] *See* MARRIAGE, 101.

Rescission for.] *See* SALE, 182.

See TRADE-MARK, 418.

GIFT.

Causa mortis — note.] An undorsed negotiable note is subject of a gift *causa mortis*, and carries a collateral mortgage. *Druke v. Heiken* (Cal.), 558.

GUARDIAN.

Testamentary — essentials of appointment.] A testamentary guardian can only be appointed by an instrument admitted to probate and naming the person intrusted with the care and nurture of the infant. *Desribe v. Wilmer* (Ala.), 501.

HANDWRITING.

See EVIDENCE, 588.

HIGHWAY.

Excessive speed of railway trains at crossing of.] *See* CRIMINAL LAW, 468.
See MUNICIPAL CORPORATION, 191, 212; NEGLIGENCE, 274; NUISANCE, 205.

HOMESTEAD.

Release of right of, by ante-nuptial contract.] A widow's homestead right cannot be barred by ante-nuptial contract. *McMahill v. McMahon* (Ill.), 819.

HOMICIDE.

In defense of property.] *See* CRIMINAL LAW, 53.

HUSBAND AND WIFE.

Witness.] *See* CRIMINAL LAW, 708.

See MARRIAGE.

IGNORANCE OF LAW.

See ESTOPPEL, 781.

INDICTMENT.

Conclusion.] *See* CONSTITUTIONAL LAW, 706.

INFANCY.

1. Coverture — disaffirmance.] A woman, married in 1844 at the age of sixteen, joined with her husband in conveying her land a year afterward, he receiving the consideration. In 1881 she gave notice of her disaffirmance of the deed, her husband joining. *Held* a valid affirmance. *Sims v. Bardoner* (Ind.), 268.

2. **Note for necessities.]** A surety on an infant's note given for necessities, having been compelled to pay it, cannot maintain an action against the infant for reimbursement during his infancy. *Ayers v. Burns* (Ind.), 759.

3. **Ratification — evidence — presumption.]** In an action on a note made by an infant, in the absence of proof that it was given for necessities, or that he retains the consideration, there must be proof of an express promise after majority. Part payment after majority is not sufficient to establish ratification, and indorsements of partial payments in the payee's handwriting, and found after his death, are not evidence even of such payment. *Callin v. Haddox* (Conn.), 249.

4. **When contract void or voidable.]** When the court can pronounce the contract of an infant to be to his prejudice, it is void, and when to his benefit, as for necessities, it is good; and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant; but that election must be exercised within a reasonable time after attaining majority. *Green v. Wilding* (Iowa), 696.

See NEGLIGENCE, 106, 586.

INJUNCTION.

See NUISANCE, 10, 649.

INSANITY.

Burden of proof.] *See CRIMINAL LAW, 426.*

See WIDOW, 539.

INSURANCE.

1. **Innocent overvaluation.]** An innocent overvaluation does not vitiate insurance. *Lynchburg Fire Insurance Company v. West* (Va.), 177.

2. **Life — "good health."] A warranty in an application for insurance upon the life of a third person that the person sought to be insured is in good health simply means that he is well to ordinary observation and in outward appearance. *Grattan v. Metropolitan Life Insurance Company* (N.Y.), 872.**

3. **Report of medical examiner.]** Where the applicant for insurance upon the life of a third person gives true answers to the medical examiner, but the latter writes down a different and untruthful answer in his report, the applicant being ignorant thereof, the insured is not responsible therefor. *Id.*

4. **Evidence — communications to physicians.]** A physician, called on to make a professional examination of a patient, may not be allowed to testify as to his opinion of his health based on "general sight," before the examination or any conversation with him. *Id.*

5. **Ownership.]** Where a father insured his life for the benefit of his infant daughter, himself paying the premiums and retaining the policy,

INSURANCE — *Continued*

- the policy running to the daughter, her executor, etc., *held*, that on her death the legal representative of the daughter was entitled to possession of the policy. *Glanz v. Gloeckler* (Ill.), 94.
6. —.] S. insured his life for the benefit of his wife, and paid the premiums until her death, he and two children surviving. Afterward he assigned his interest to H., as security, and H. paid the premiums until S.'s death. *Held*, that on the wife's death one-third of the policy went to the husband, and two-thirds to the children, and that H. could take only the one-third, but that he was entitled to be reimbursed for the premiums he had paid, with interest. *Harley v. Heist* (Ind.), 285.
7. Marine — change of ship — "connections."] It is an implied condition of marine insurance of freight that the ship shall not be changed without necessity or consent. Wheat was insured on a certain steamer "and connections," from San Francisco to Hong Kong. It was the custom to carry without transshipment, but in this case the cargo was unnecessarily transferred to other ships of the same company at Yokohama, and conveyed to Hong Kong, where it was lost. *Held*, that "connections" meant regular connections, and not an unusual substitution unanticipated at the time of the issuing of the policy, and that the policy was avoided. *Schroeder v. Schweizer Lloyd Transport Versicherungs Gesellschaft* (Cal.), 61.
- Regulation of foreign company.] *See* CONSTITUTIONAL LAW, 880.

INTOXICANTS.

See 549, 554, 634, 699.

JEOPARDY.

See CRIMINAL LAW, 29.

JUDGE.

Disqualification — having been counsel.] A wife sued for a divorce on the ground of cruelty and was defeated. Afterward the husband sued for divorce for abandonment and succeeded. The judge who presided on the second trial was attorney for the husband on the first. *Held*, that he was incompetent as having "been counsel in the case," and the decree was not conclusive. *Newcome v. Light* (Tex.), 604.

JUDGMENT.

Set-off of.] *See* SET-OFF, 280.

See FORMER ADJUDICATION, 806.

JURISDICTION.

See BANK, 558.

JURY.

Misconduct — drinking spirituous liquors.] During a murder trial, lasting eleven days, large quantities of beer, wine and whisky were ordered by

the jury, at their own expense, and consumed by them, mostly before the submission, but some afterward, without permission of the court and without the knowledge of the defendant. It did not clearly appear that any juror was intoxicated. *Held*, that a conviction must be set aside. *People v. Gray* (Cal.), 549.

LANDLORD AND TENANT.

1. **Concealment of dangerous condition of premises.]** Where a landlord lets a house knowing that the timbers of the privy floor are rotten and unsafe, but conceals the fact from the tenant, and the tenant is injured by the defect, the landlord is liable therefor. *Coke v. Gutkess* (Ky.), 499.
2. **Holding over.]** A tenant for years who holds over for only a few days may be treated as a tenant for another year, the landlord having given him notice to quit, although he has refused to renew the lease, and has notified the landlord that he has rented other premises; and he is not relieved by the fact that the other premises were not ready for him. *Wolfe v. Wolf* (Ala.), 536.
3. **Liability of former to latter for negligence.]** Where a landlord lets apartments in the same house to different tenants, and one of the tenants is injured by means of a temporary accumulation of ice and snow on the common stair-way, the landlord is not liable in the absence of an agreement on his part to keep the premises fit for occupation; and his promise to repair, made subsequent to the leasing, is not binding. *Parcell v. English* (Ind.), 255.
4. **Surrender of premises.]** A lessee vacated the premises during the term, and gave the keys to the landlord, who took and retained them, but notified the lessee that he should hold him for the rent, and subsequently let the premises to another, after notifying the lessee of his intention to do so. *Held*, that the lessee was liable for the difference in the rent received. *Auer v. Penn* (Penn.), 114.

See DAMAGES, 134.

LEASE.

Or sale.] *See SALE*, 598.

See LANDLORD AND TENANT.

LEGISLATURE.

Limit of power.] *See CONSTITUTIONAL LAW*, 808.

LESSOR.

See MASTER AND SERVANT, 723; *LANDLORD AND TENANT*.

LIBEL.

See SLANDER AND LIBEL.

LICENSE.

See FROELICH, 877.

LOTTERY.

Action for chattel drawn in.] Lotteries being declared illegal by statute, no action lies for the recovery of a chattel in favor of one who claims to have drawn it in a lottery, as against another who has possession of it under the like claim. *Funk v. Galloan* (Conn.), 210.

MALICIOUS PROSECUTION.

Mere suit.] An action may lie for malicious prosecution although there was no arrest of person or seizure of property. *McCardle v. McGinley* (Ind.), 342.

MALICE.

See SLANDER AND LIBEL, 461.

MANSLAUGHTER.

See CRIMINAL LAW, 569.

MARRIAGE.

1. By divorced prohibited party.] A wife procured a divorce in New York for adultery, and the husband was prohibited by the decree from remarrying during her life. The husband afterward remarried in New Jersey, during her life, and returned with that wife and resided in New York, and they had a child born in New York. The New Jersey statute enacts that "all marriages, where either of the parties shall have a former husband or wife living at the time of such marriage, shall be invalid, * * * and the issue thereof shall be illegitimate." The New Jersey statutes do not prohibit remarriage by divorced parties. *Held*, that the child would inherit in New York. *Moore v. Hegeman* (N. Y.), 408.
2. Divorce — statutory construction.] Where a statute provides that divorce bars curtesy and dower, it embraces a valid divorce obtained in another State. *Hawkins v. Ragsdale* (Ky.), 483.
3. Foreign — conflict of laws.] A subject of the king of Würtemberg, while domiciled in Illinois, married there in accordance with the laws of that State. The marriage was however void, according to the laws of Würtemberg, because contracted without the license of the sovereign. The parties returning to that kingdom, and becoming domiciled there, at the suit of the husband the marriage was there decreed to be void. *Held*, that the decree deprived the wife of all rights, as widow or heir, in her deceased husband's estate in Illinois. *Roth v. Roth* (Ill.), 81.
4. Fraud in — concealed pregnancy.] Where a woman contracts marriage while pregnant by another than her husband, and conceals her pregnancy, it is for a jury to determine whether this is such fraud as avoids the marriage. *Allen's Appeal* (Penn.), 101.

See DEED, 861; HOMESTEAD, 819.

1. **Action for wages — recoupment for seduction.]** In an action for wages for service in a family, the employer may recoup damages for the seduction of his daughter. *Bixby v. Parsons* (Conn.), 246.
2. **Negligence of general superintendent.]** Where a manufacturing company employed a competent superintendent to keep the machinery in repair and good order, and another employee is injured by reason of the superintendent's negligence in that regard, the master is liable. *Gunter v. Graniteville Manufacturing Company* (S. C.), 573.
3. **Lessor and lessee's servant.]** A lessor is not liable to a servant of the lessee for an injury resulting from the negligence of the latter, unless it arose from some unperformed duty remaining upon the lessor, even though the servant was originally the servant of the lessor, was ignorant of the lease, and supposed himself still in the lessor's employ. *Crusselle v. Pugh* (Ga.), 723.

See CONTRACT, 630.

MECHANICS' LIEN.

Public property.] A mechanics' lien will not attach to a public square and court-house. *Board of Commissioners v. O'Conner* (Ind.), 338.

MORTGAGE.

1. **Assumption by grantee.]** Where a grantee of mortgaged premises agrees with the grantor, mortgagor, to pay the mortgage, no right of action accrues to the mortgagee on the promise. *Meech v. Ensign* (Conn.), 225.
2. **On unplanted crop.]** A mortgage on an unplanted crop conveys only an equitable title, but this attaches instantly on the planting, and is superior to a second mortgage executed prior to the planting, the second mortgagee having notice of the former mortgage. *Mayer v. Taylor* (Ala.), 522.

MUNICIPAL CORPORATION.

1. **County liability for defect in court-house.]** A county is not liable for an injury from a defective sidewalk appurtenant to the court-house. *Doedall v. County of Olmstead* (Minn.), 185.
2. **Duty of town as to snow in highway.]** A town is not required to keep the entire surface between the fences of a highway free from snow-drifts, nor to clear the drifts from the track usually travelled in the summer; but it is sufficient if there is a reasonably safe and convenient path anywhere within the limits. *Seeley v. Town of Litchfield* (Conn.), 213.
3. **— custom.]** The custom of the inhabitants of Connecticut towns to join and break paths through the snow in highways is ancient, general and reasonable, and excuses the selectmen from action in ordinary cases. *Id.*
4. **Negligence of fire department.]** A city is not responsible for the negligence of its fire department whereby the property of a citizen is destroyed by fire. *Robinson v. City of Evansville* (Ind.), 770.

MUNICIPAL CORPORATION — *Continued.*

5. Nuisance — coasting on street.] A traveller on a city street was injured by persons coasting on the street. The coasting was carried on by a large crowd, in presence of the mayor, marshal and police officers. There was an ordinance prohibiting on the streets all sports tending to produce bodily injury. *Held*, that no action would lie against the city. *Faulkner v. City of Aurora* (Ind.), 1.
6. Obstruction of streets.] No action lies against a city for a personal injury caused by collision with a rope stretched across a street, by order of the municipal authorities, in order to allow a parade of the fire department. *Simon v. City of Atlanta* (Ga.), 789.
7. Ordinance — fire.] A municipal ordinance, prohibiting the keeping on any block at one time of more than five tons of straw unless protected by a fire-proof inclosure, is valid. *Clark v. City of South Bend* (Ind.), 13.
8. — power to prohibit nuisance.] A municipal corporation empowered to define, declare, prevent and abate nuisances, and punish their promoters, may by ordinance prohibit the running of street cars by steam, under penalty for violation, in the absence of any legislative grant authorizing such use of the streets. *North Chicago City Railway Company v. Town of Lake View* (Ill.), 788.
9. Town liability for highway.] A town is not civilly liable for an injury by a defect in a highway, in the absence of a statutory declaration to the contrary. *Altow v. Town of Sibley* (Minn.), 191.
10. Limitation of indebtedness.] *See* CONSTITUTIONAL LAW, 785.
See NUISANCE, 349.

NECESSARIES.

Infant's note for.] *See* INFANCY, 759.

See INFANCY, 349.

NEGLIGENCE.

1. Concurrent — remedy.] Where a railway passenger is injured by a negligent collision of his train with that of another company, he may maintain an action for the wrong against either company. *Wabash, St. Louis & Pacific Railway Company v. Shacklet* (Ill.), 791.
2. Contributory — infant trespassing on railway.] An intelligent boy, ten years of age, was sent by his parents on an errand on a street in a populous city, and while unnecessarily walking along a steam railway laid in the street was killed by a train. *Held*, that his contributory negligence defeated a recovery by the parents. *Moore v. Pennsylvania Railroad Company* (Penn.), 106.
3. — leaving train in motion.] One who entered a railway train as an escort for a woman, to find her a seat, and who was injured in the endeavor to leave the train while it was under way, with some papers in his hands, is without remedy. *Central Railroad and Banking Company v. Letcher* (Ala.), 505.

4. **Contributory — riding on car platform.]** A passenger on a steam railway train, unable to find a seat, although there was standing room inside, stood on the platform of a car, near the edge and was thrown off by an ordinary jolt and injured. *Held*, that he had no cause of action against the railway company. *Camden and Atlantic Railroad Company v. Hooey* (Penn.), 180.

5. — **travelling on defective highway.]** A traveller, knowing the dangerous condition of a highway, is not necessarily negligent in persisting in travelling upon it. *Henry County Turnpike Company v. Jackson* (Ind.), 274.

See 8, 10, *infra*.

6. **Railroad — duty to implied licensees.]** Where a railroad company have for more than thirty years without objection permitted the public to cross its track at a certain point not in itself a public crossing, it owes the duty of reasonable care toward those so using the crossing. *Barry v. New York Central, etc., Railroad Company* (N. Y.), 377.

7. — **leaving turn-table unlocked — infant trespasser.]** An infant of tender years, sustaining an injury while playing on a railway turn-table left unlocked and unguarded on premises of the company accessible to the public, may maintain an action therefor. *Evansich v. G. C. & S. F. Railway Company* (Tex.), 586.

8. — **liability for fires — contributory negligence.]** The owner of land over which a railroad runs has no right to enter thereon to remove combustibles; the accumulation of such substances thereon may warrant a finding of negligence by the company; and it is not negligent in such owner to permit dry grass and stubble to remain on his adjoining land. *Pittsburgh, Cincinnati and St. Louis Railway v. Jones* (Ind.), 334.

9. — **flagman.]** In an action against a railroad company for an accident at a crossing, it is error to leave it to the jury to determine whether the omission to have a flagman at the point was negligent. *Houghkirk v. President, etc., Delaware, etc., Co.* (N. Y.), 370.

10. — **contributory negligence.]** It is negligent in a street railway company to have two tracks laid so near together that a passenger's arm projecting a few inches from a car window may be hit by a passing car, and it is not necessarily negligent in the passenger to allow his arm so to project. *Summers v. Crescent City Railroad Company* (La.), 419.

11. **Selling poison — statute.]** Where a druggist sells poison, fully warning the purchaser of its dangerous character and clearly informing him as to what is a safe dose, and the purchaser is killed by taking an overdose in disregard of such direction, the druggist is not liable for not having labelled the parcel "poison," in conformity to the statute. *Wohlfahrt v. Becket* (N. Y.), 406.

Evidence of former.] *See* EVIDENCE, 692.

Liability of agent to third person for.] *See* AGENCY, 456.

Of fire department.] *See* MUNICIPAL CORPORATION, 770.

See LANDLORD AND TENANT, 255, 499; MASTER AND SERVANT, 573, 723; MUNICIPAL CORPORATION, 178, 191; TELEGRAPH COMPANY, 589, 610, 614.

NEGOTIABLE INSTRUMENT.

1. **Alteration — obtaining additional surety.]** The obtaining by the principal of the signature of a surety to a promissory note before delivery to the innocent payee is not an alteration avoiding the note as to precedent surety. *Ward v. Hackett* (Minn.), 187.
2. **Conditional delivery by surety.]** A surety on a negotiable promissory note, perfect on its face, cannot defeat a *bona fide* holder by proof that he delivered it to the principal on the condition that it should be signed by another surety, which condition was not fulfilled. *Id.*
3. **Consideration.]** A promissory note executed in consideration of a father's naming a child after the promisor, and in pursuance of the promisor's agreement that if the child were so named he would provide for its education and support, is on a valid consideration. *Wolford v. Powers* (Ind.), 16.
4. **Note not stating amount except in marginal figures.]** There can be no recovery at law upon an instrument in the form of a promissory note, but stating no amount in the body of the note, although figures are set forth in the margin. *Hollen v. Davis* (Iowa), 688.
5. **Uncertainty of time of payment.]** A promissory note providing that the payee (maker) or his assigns may extend the time of payment indefinitely is not negotiable. *Woodbury v. Roberts* (Iowa), 685.
6. **Waiver of protest and notice.]** Waiver of "protest and notice" on a note waives demand. *Baker v. Scott* (Kans.), 628.

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NOTICE.

Of sale in Sunday newspaper.] See SUNDAY, 756.

NUISANCE

1. Cheap tenement-houses, when not.] The owner of land has the right to erect small, cheap and movable tenement-houses thereon close to the line of an adjacent owner, and let them to orderly colored tenants, although his avowed purpose is to punish the adjacent owner for refusing to sell him his land at an inadequate price, and to compel him to do so. *Falloon v. Schilling* (Kans.), 642.
2. Created by contractor — liability of principal.] Where a contractor so performs the work of his principal that it becomes a nuisance, the principal, if he accepts the work in that condition, is liable for consequent and subsequent injury to others. *Vogel v. Mayor, etc., of New York* (N. Y.), 849.
3. Horse at large on highway.] A horse unlawfully at large on a highway is a nuisance, and its owner is liable for any damage done by it, whether the animal is vicious or not. *Baldwin v. Ensign* (Conn.), 205.
4. Public — abatement.] The mayor of a city, by virtue of his office, may demolish a wooden dwelling-house in a city, which by reason of the combustible nature of its materials and the disorderly character of its occupants endangers the lives, health and property of the neighboring residents. *Fields v. Stokley* (Penn.), 109.
5. Stable — injunction.] A stable is not a nuisance *per se*, and an injunction will not issue to restrain the erection of a building designed for a stable, twenty-five or thirty feet from the plaintiff's house and well, in the absence of proof that the building was to be used as a stable and that such use

NUISANCE — Continued

would be dangerous or offensive to the occupants of the plaintiff's house.
Keiser v. Lovett (Ind.), 10.

Power to prohibit.] See MUNICIPAL CORPORATION, 788.

See CRIMINAL LAW, 468 ; MUNICIPAL CORPORATION 1.

ORDINANCE.

See MUNICIPAL CORPORATION, 13.

PARENT AND CHILD.

Parent's liability for child's act as contractor.] A minor son contracted with his father to clear a parcel of land, and in doing so negligently burned property of a third person. *Held*, that the father was liable. *Teagarden v. McLaughlin* (Ind.), 332.

PAROL EVIDENCE.

See EVIDENCE ; WILL, 158.

PARTNERSHIP.

Dissolution — assumption of debts by one partner — agreement of creditor to look to him.] Where a partnership is dissolved, one partner taking all the property and assuming all the debts, all the partners are still liable on an acceptance previously given for goods, although the vendor may have promised to release the retiring partners and look to the other alone, there being no new consideration for such promise. *Eagle Manufacturing Company v. Jennings* (Kans.), 668.

PAYMENT.

See BANK, 136 ; ESTOPPEL, 731.

PHYSICIAN.

Evidence of.] See INSURANCE, 372.

PRESUMPTION.

See CRIMINAL LAW, 55 ; INFANCY, 249.

PROMISSORY NOTE.

See GIFT, 553 ; NEGOTIABLE INSTRUMENT.

PROTEST.

See NEGOTIABLE INSTRUMENT, 628.

PROXIMATE CAUSE.

See TORT, 42.

PUBLICATION.

See SLANDER AND LIBEL, 773.

In street — power to prohibit.] See MUNICIPAL CORPORATION, 798.
 Excessive speed at highway crossing.] See CRIMINAL LAW, 468.
 Liability for fires.] See NEGLIGENCE, 334.
 In street.] See CONSTITUTIONAL LAW, 488.
 Regulation of freight charges.] See CONSTITUTIONAL LAW, 672.
 Running trains on Sunday.] See SUNDAY, 475.
 See CARRIER, 444; EMINENT DOMAIN, 799; NEGLIGENCE, 370, 377, 419, 505, 588.

RECOUPMENT.

See MASTER AND SERVANT, 246.

REPLEVIN.

1. Crops — statute construction — "other property."] Replevin will not lie for crops severed by the person in possession of the land under claim of title, either at common law or under a statute enabling the owner of the land to maintain replevin for timber, lumber, coal or "other property" severed therefrom. *Renick v. Boyd* (Penn.), 124.
2. Property destroyed by act of God.] An execution issued to enforce a judgment for the return of property in replevin, or its value, may not be resisted upon the ground that the property has been destroyed by the act of God. *De Thomas v. Witherby* (Cal.), 542.

RESCISSION.

See SALE, 182.

SALE.

1. By sample — acceptance.] The defendant orally agreed to buy of the plaintiff two car-loads of barley by sample. The barley was in the plaintiff's elevator on a public railway track in Minneapolis leading to a point near the defendants' brewery. The defendants requested that the barley be sent down to their brewery, and the cars were sent accordingly, and the defendants inspecting the grain, and finding it inferior to the sample, refused to accept it, and so notified the plaintiff. *Held*, that there was no delivery and acceptance. *Taylor v. Mueller* (Minn.), 199.
2. Conditional — attaching creditors.] Where chattels are sold and delivered on condition that title is not to pass until they are paid for, an attaching creditor of the vendee can acquire no right superior to the vendor's right. *Lewis v. McCabe* (Conn.), 217.
3. Or lease of piano.] On receipt of \$75, a piano was delivered by C. to N., under a writing reciting a hiring, and promising quarterly payments of \$50 each in addition, so long as it should be kept, to return it on demand, not to remove it without C.'s consent, and to keep it insured; also stipulating that on further payment of \$350 in equal monthly installments, the piano was to become N.'s. N. sold the piano to a purchaser in good faith. *Held*, that the latter got title, the agreement not having been recorded. *Knittel v. Cushing* (Tex.), 598.

SALE — *Continued.*

4. **Rescission for fraud, after judgment for price.]** The right of the vendor of goods to rescind the sale, for fraud on the part of the vendee, is not defeated by his having obtained judgment for the price in ignorance of the fraud. *Kraus v Thompson* (Minn.), 183.
 5. **Warranty, implied and express.]** Where a piano manufacturer sells a piano of his manufacture to one whom he knows to be a piano dealer and purchasing to resell or let, there is an implied warranty that the material and workmanship are good, that the instrument shall be reasonably adapted to the uses for which it is made and sold, and that it shall be a reasonably good instrument considering the class or style and price. *Snow v. Schomacker Manufacturing Company* (Ala.), 509.
 6. —.] Where a piano manufacturer offers by letter to sell pianos of his manufacture, stating terms, and directing attention to an accompanying circular on the front page of which is conspicuously printed, "Every piano warranted for five years," these words constitute a warranty that each piano sold has no inherent defect of materials or workmanship that will cause it to break or give way in five years, but not a warranty of style or grade. *Id.*
- Fraudulent.]** See FRAUD, 243.

SEDUCTION.

See MASTER AND SERVANT, 246.

SET-OFF.

1. **Of judgments — exemption — champerty.]** An attorney, having a lien by statute for services in procuring a judgment, has a superior right to that of a judgment debtor to set off a judgment acquired by him against the client. *Puett v. Beard* (Ind.), 280.
2. —.] Where a judgment debtor has no property save a judgment for less than the amount exempted by statute from execution, the defendant in that judgment may not satisfy it by set-off of another judgment. *Id.*
3. —.] A judgment founded on contract may be set off against one founded on tort. *Id.*
4. —.] An assignment of a judgment to one who has illegally furnished money to carry on the action is subject to the right of the judgment debtor to set off a judgment against the assignor. *Id.*

SLANDER AND LIBEL.

1. **Malice — interest.]** The defendant's wife, a stockholder in a street railway company, informed her husband that she heard persons boast that a car of the company driven by the plaintiff was "a good dead-head car" for them, and the defendant informed the foreman of the company, who thereupon without investigation or notice dismissed the plaintiff. *Held*, that an action of slander would not lie, there being no proof of actual malice. *Haney v. Trost* (La.), 461.
2. **Publication — letter.]** No action lies for a libel published only by writing and mailing it to the plaintiff. *Spaite v. Poundstone* (Ind.), 773.

STATUTE.

Construction.] See MARRIAGE, 483; REPLEVIN, 124.

— bigamy.] See CRIMINAL LAW, 357.

Discrimination in.] See CONSTITUTIONAL LAW, 513.

See MARRIAGE, 408; NEGLIGENCE, 406; WITNESS, 97.

STOCK.

Corpus — dividends.] Under a bequest of stock in trust, the income going to a life tenant, with remainder over, dividends, whether in cash or certificates of indebtedness, and although infrequent and unusually large, go to the life tenant. *Millen v. Guerrard* (Ga.), 720.

See CORPORATION, 112.

STREET.

Boundary on.] See BOUNDARY, 90

Power to prohibit railroad in.] See MUNICIPAL CORPORATION, 788.

Obstruction of.] See MUNICIPAL CORPORATION, 789.

Railroad in.] See CONSTITUTIONAL LAW, 488.

See MUNICIPAL CORPORATION, 1.

SUNDAY.

1. Legal advertisement in Sunday newspaper.] The publication of a sheriff's notice of sale in a Sunday newspaper is invalid. *Shaw v. Williams* (Ind.), 756.

2. Official bond executed on. An official bond signed and delivered on Sunday by a surety to the principal, and delivered by the principal to the proper custodian on a secular day, binds the surety. *City of Evansville v. Morris* (Ind.), 763.

3. Running railway trains on.] It is lawful for a railway company to run trains for passengers, mails and express freight, on Sunday. It is a "work of necessity." *Commonwealth v. Louisville and Nashville Railroad Company* (Ky.), 475.

SURETY.

Action by creditor against, for money delivered to him by principal.]

When a principal debtor delivers to his surety money to pay the debt to the creditor, he may re-demand it before payment, and the creditor gets no lien on it and can maintain no action for it against the surety. *Spalding v. Henshaw* (Ky.), 463.

See INFANCY, 759; NEGOTIABLE INSTRUMENT, 187.

SURFACE WATER.

See WATER AND WATER-COURSE, 147.

TAXATION.

[Of occupation.] See CRIMINAL LAW, 680.

See CONSTITUTIONAL LAW, 679.

TELEGRAPH COMPANY.

1. **Conflict of law — rights of licensor of patent.]** The defendant, a Connecticut telephone company, had purchased from a Massachusetts telephone company, owning the patent, the right to use its magnetic telephone system for a certain period, on the condition that it should not permit telegraph companies to use the system unless they had purchased the right from the Massachusetts company. A statute of Connecticut provides that every telephone company shall impartially permit persons and corporations to transmit speech through its wires by its instruments. The plaintiff, a telegraph company in Connecticut, not having purchased the right, sued to compel the defendant to permit it to use the system. *Held* not maintainable. *American Rapid Telegraph Company v. Connecticut Telephone Company* (Conn.), 337.
2. **Contract to evade penal liability.]** A telegraph company cannot by contract evade a penal statutory liability for failure to transmit a message correctly. *Western Union Telegraph Company v. Adams* (Ind.), 776.
3. **Limitation of liability for negligence.]** The sender of a telegram is chargeable with notice of the printed conditions of the blank form on which it is written. *Womack v. Western Union Telegraph Company* (Tex.), 614.
4. —.] A limitation of liability for mistake in transmission thus provided in case of unrepeatd messages is lawful. *Id.*
5. —.] The mere fact that the message as delivered at its destination differs from that delivered for transmission, in a single letter, is not sufficient to warrant a larger recovery than that provided for in the limitation. *Id.*
6. **Negligence—damages.]** The defendant telegraph company received from a banking-house, acting as agent for plaintiff, a message to another banking-house, directing the latter to protect the plaintiff's note. The sender paid the price of repeating. The message never was delivered. *Held*, (1) that the defendant was liable to the plaintiff; (2) that the damages should not be measured by the limitation provided in case of repeated messages in the blank form on which the message was written, but would embrace all actual damages, including injury to credit; (3) but not exemplary damages, in the absence of proof of express or implied authority or adoption by the company. *Western Union Telegraph Company v. Brown* (Tex.), 610.
7. — —.] A telegraph company may lawfully limit its liabilities for delays in transmitting and errors in delivering half-rate messages in the night without repetition, by express contract, or by notice in the telegraph blank used by and known to the sender, unless shown to have been occasioned by misconduct, fraud or want of due care; and in such case the receiver cannot recover more than the stipulated rate of damages where he had reason to suspect an inaccuracy, and neglected to

demand repetition, relying on the receiving operator's assurance of correctness. *Western Union Telegraph Company v. Neill* (Tex.), 589.

See EVIDENCE, 630.

TENANCY.

By entirety.] See DEED, 361.

TORT.

Proximate cause.] The defendant, an unlicensed liquor seller, on Sunday, in violation of the statute, furnished D. intoxicating liquor to drink, upon which D. became intoxicated and unconscious. The defendant put D. in this condition into his vehicle, drawn by a gentle horse which he had borrowed of the plaintiff; and by reason of his intoxication and inability to manage the horse, it ran away and was killed. *Held*, that an action would lie for its value. *Dunlap v. Wagner* (Ind.), 43.

TOWN.

See MUNICIPAL CORPORATION, 10.

TRADE-MARK.

1. Infringement — deceit — acquiescence.] A trade-mark may be acquired in the words "Boker's Stomach Bitters," and it will not be defeated by the plaintiff's unwarranted use of the word "imported" in connection with it, unless such use is intended to deceive the public, nor by the plaintiff's mere neglect to prosecute others who have infringed it. *Peaks v. Dreyfus* (La.), 418.
2. "Snowflake" crackers.] "Snowflake" is not a valid trade-mark for bread or crackers. *Larrabee v. Lewis* (Ga.), 785.

VERDICT.

Mis spelled.] See CRIMINAL LAW, 708.

Walled prisoner not present at.] See CRIMINAL LAW, 743.

WALL.

See EASEMENT, 484.

WAREHOUSEMAN.

Public — right of discrimination.] One who assumes to carry on the business of a public warehouseman for the purchase of tobacco and the public sale thereof at auction is bound to serve the public without discrimination, and may not select his bidders nor reject any producer. *Nash v. Page* (Ky.), 490.

WARRANTY.

Implied, on sale of stock.] See CORPORATION, 112.

See SALE, 509.

WATER AND WATER-COURSE.

1. **Constitutional law — bridging navigable streams.]** Under a legislative authority to construct a railway between certain points, the company may build, maintain and repair necessary draw-bridges across navigable streams, and will not be liable for temporary obstruction of the stream in the course of such work. *Hamilton v. Railroad Company* (La.), 451.
 2. **Diversion of small navigable inland lake.]** The plaintiffs owned and operated mills on a fresh and non-navigable creek, fed by the surplus waters of three small inland lakes, one of which was navigable, and navigated for local purposes by those who dwelt on its shores. All the premises in question were originally ceded by the State of Massachusetts by the treaty of 1786. The defendant, under recent legislative authority, constructed a conduit from the latter lake to supply the city, drawing 4,000,000 gallons of water daily. *Held*, that such diversion, being injurious to the defendant, may be enjoined, and the defendant must respond for the injury. *Smith v. City of Rochester* (N. Y.), 398.
 3. **Surface water.]** The owner of lands may drain them by ditches, although he thereby precipitates the water more rapidly and in greater volume upon the land of an adjoining owner, provided he acts with a prudent regard for his welfare; but he may not turn water upon such adjoining lands which would not otherwise have flowed there. *Hughes v. Anderson* (Ala.), 147.
 4. **Throwing refuse in stream.]** The owner of a saw-mill upon a stream has no right to suffer saw-dust or other refuse from the mill to fall into the stream, to the injury of a lower proprietor, although there is no other way of disposing thereof, without rendering the mill useless, and it is the custom so to dispose thereof, unless it also appears that the mill could not have been constructed so as to avoid the necessity. *Red River Roller Mills v. Wright* (Minn.), 194.
- Boundary on.]** See BOUNDARY, 90.

WIDOW.

- Insanity of, affecting right to dissent from husband's will.]** The right of a widow to dissent from a provision made for her in her husband's will in lieu of dower is personal, and if she is insane her right is defeated. *Orenshaw v. Carpenter* (Ala.), 589.

WILL.

1. **Construction—child in ventre sa mere.]** A testator in 1849 devised real estate to his daughter "A. and her children." A. then had a child, which died in December, 1850. She had another, born November 20, 1851, which died when three days old. Subsequently she had other children. The testator started on a journey in January, 1850. In November, 1851, on information of his death, the will was admitted to probate, but the date of his death was never ascertained. *Held*, that it might be inferred that he died while the second child was in ventre sa mere, and that A. and that child took as tenants in common, to the exclusion of the subsequently born

children, and that on the death of the second child its share passed to its parents. *Biggs v. McCarty* (Ind.), 890.

2. **Devise during life, with power of disposal.** A testator devised his whole estate to his wife, "to have and to hold or to dispose of so much of the same as she may need or wish to use during her life-time," and provided that "after her death if there is any thing left," it should be divided in a specified way. *Held*, that the widow's power of disposal was absolute and not limited to her life estate, but could only be exercised in case and to the extent of her need. *Henderson v. Blackburn* (Ill.), 780.
3. **Olographic—definition of.]** A will consisting in a printed form with the blanks filled in the testator's handwriting is not an olographic will, and no part of it can stand. *Estate of Rand* (Cal.), 555.
4. **Parol evidence to explain.]** A testator made a bequest to his namesake "S. G., son of Captain J. F. S." *Held*, that evidence was admissible that there was no person answering the description, and that the testator intended S. G., son of Captain J. F. H. *Hawkins v. Garland's Administrator* (Va.), 158.

See WIDOW, 589.

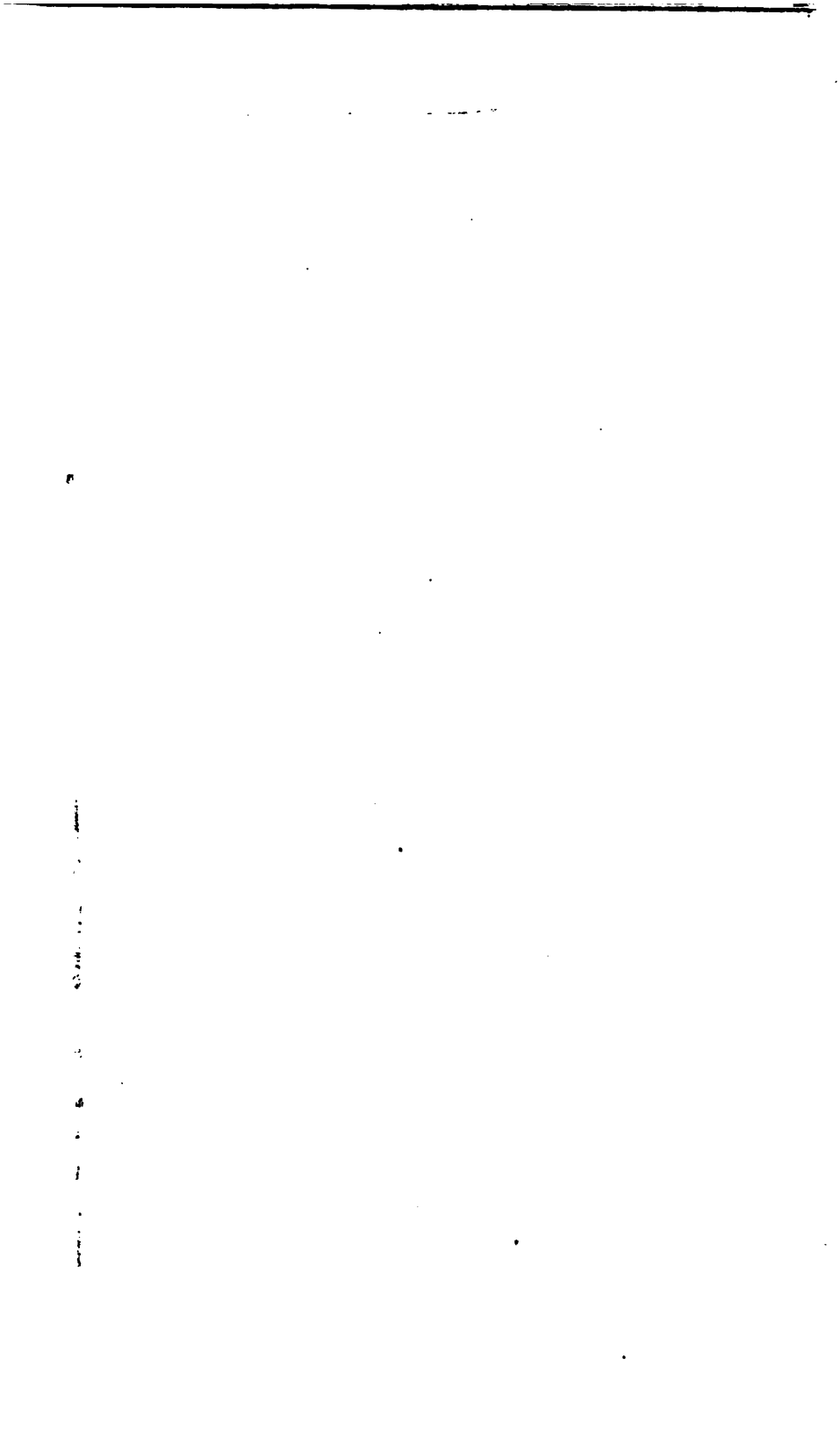
WITNESS.

Infamy—statutory construction.] A statute enacted that no person should be disqualified as a witness by reason of criminal conviction, but the conviction might be shown to affect his credibility, and that any defendant in a criminal case might at his option be a competent witness. The statute also specified certain crimes, conviction of which rendered the party infamous. *Held*, that to impeach a defendant in a criminal case for infamy, the judgment of the former conviction must be shown, and mere evidence that he has been a convict in a State prison is inadequate. *Bertholomew v. People* (Ill.), 97.

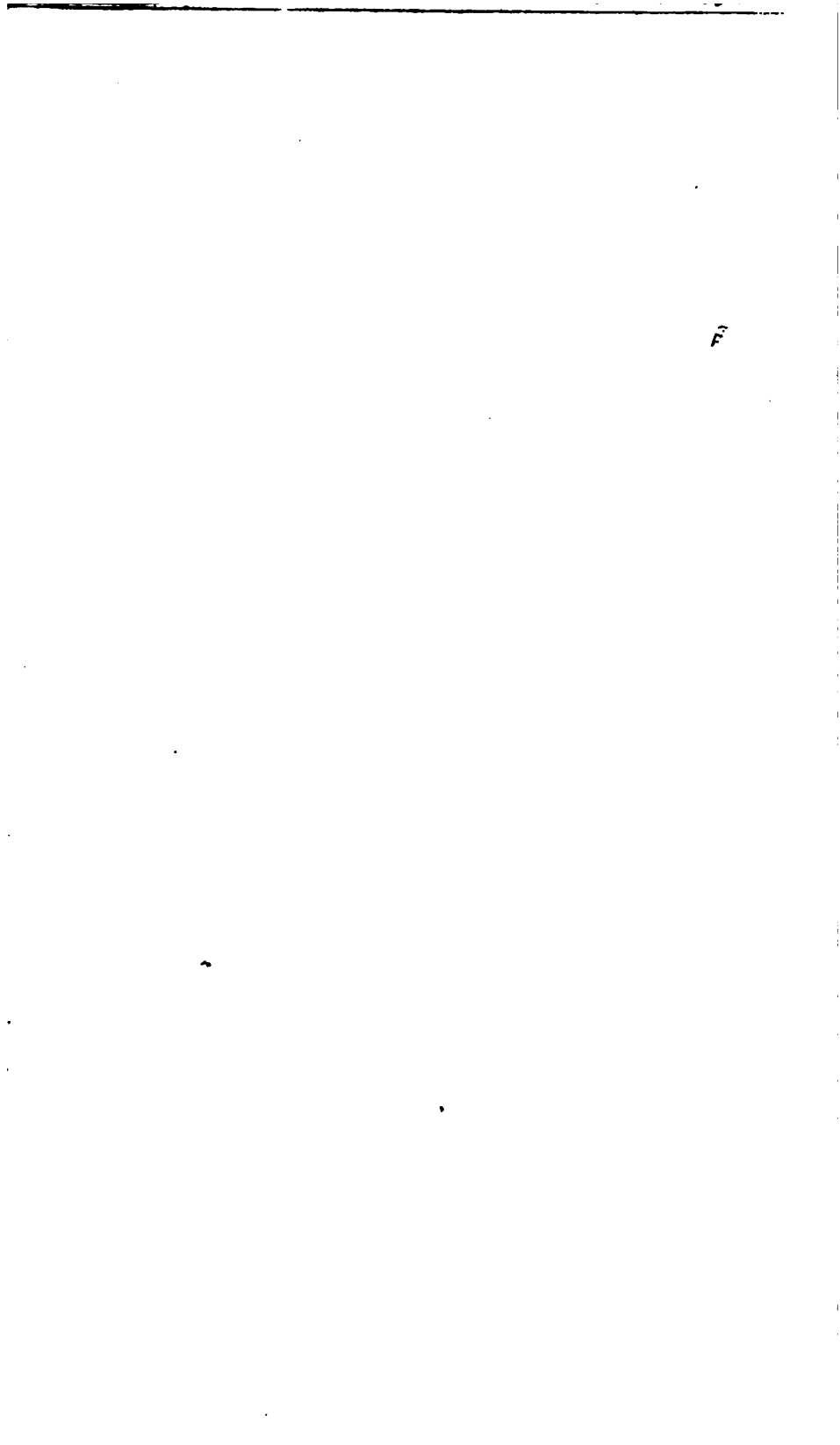
Husband and wife.] *See* CRIMINAL LAW, 708.

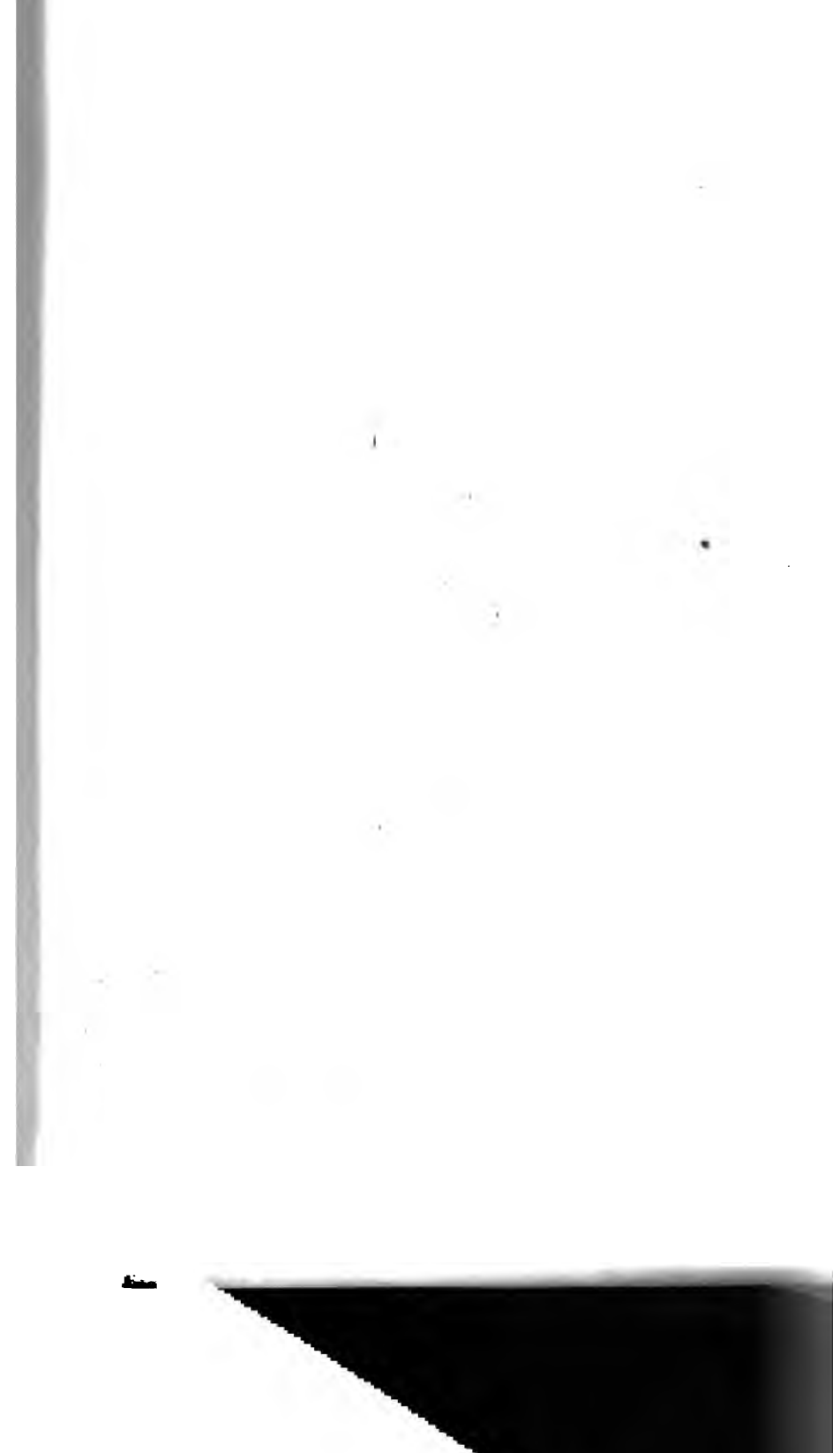
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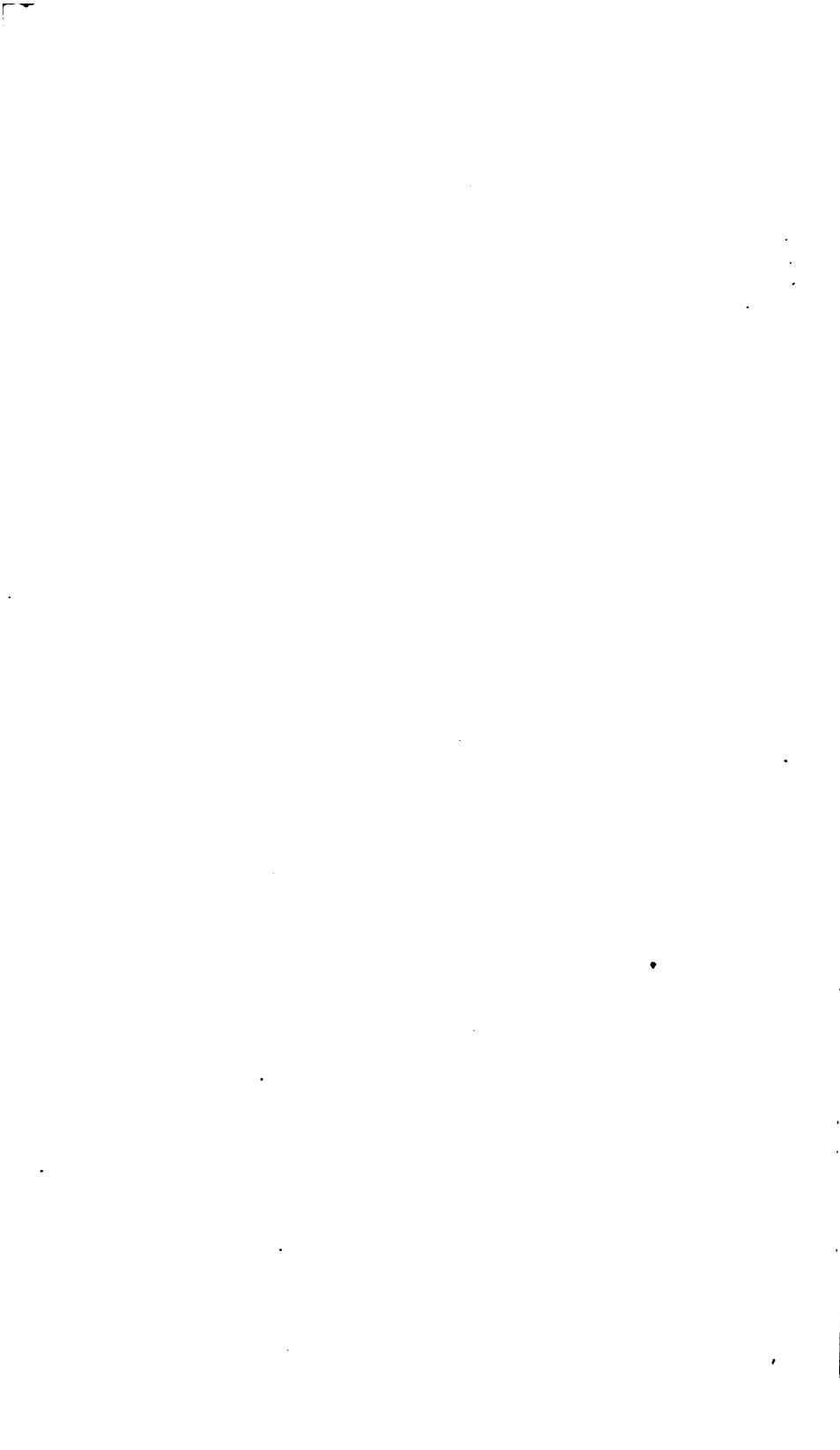
- "Connections." *See* INSURANCE, 61.
- "Good health." *See* INSURANCE, 873.
- "Olographic." *See* WILL, 555.
- "Other property." *See* REPLEVIN, 124.
- "Snowflake." *See* TRADE-MARK, 735.
- "Tools and apparatus." *See* EXECUTION, 681.



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